89-1263

Supreme Court, U.S.
FILED
DEC 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. ________

In the

Supreme Court of the United States

October Term, 1989

WILLIAM R. FISCHER, The Estate of BETTY L. FISCHER, MONTFORD R. FISCHER, and BONITA G. FISCHER,

Petitioners,

vs.

NWA, INC., NORTHWEST AIRLINES, INC., and SIMMONS AIRLINES, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL R. SHULMAN
George R. Wood
Gray, Plant, Mooty,
Mooty & Bennett, P.A.
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402
Telephone (612) 343-2800

JOSEPH M. ALIOTO
Alioto & Alioto
Twenty-Third Floor
650 California Street
San Francisco, California 94108
Telephone (415) 434-2100

Attorneys for Petitioners

1989 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518 ■ FAX 612-337-8053

QUESTIONS PRESENTED FOR REVIEW

1. Does a competitor sustain antitrust injury when a merger creates a monopoly that permits the monopolist to exclude the competitor from the monopolized market?

2. Does a competitor sustain antitrust injury when a monopolist refuses to deal with and excludes the competitor from the monopolized market because the competitor will not accept an anticompetitive agreement insisted on by the monopolist?

3. Does the Eighth Circuit majority opinion in this case impermissibly misconstrue and disregard this Court's decisions in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)?

4. Does Department of Transportation approval of an airline merger, without an express grant of immunity under 49 U.S.C. App. § 1384, nonetheless preclude a subsequent lawsuit by a competitor alleging the merger to be in violation of Sections 1 and 2 of ion approval of an airline merger, without an express grant of immunity under 49 U.S.C. App. § 1384, nonetheless preclude a subsequent lawsuit by a competitor alleging the merger to be in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal:

No. ________

In the

Supreme Court of the United States

October Term, 1989

WILLIAM R. FISCHER, The Estate of
BETTY L. FISCHER, MONTFORD R. FISCHER,
and BONITA G. FISCHER,

Petitioners,

vs.

NWA, INC., NORTHWEST AIRLINES, INC.,
and SIMMONS AIRLINES, INC.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners William R. Fischer, the Estate of Betty L. Fischer, Montford R. Fischer, and Bonita G. Fischer ("petitioners") respectfully pray this Court to issue a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit dated August 17, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered on August 17, 1989, and is reported at 883 F.2d 594 (8th Cir. 1989). A copy of the opinion is attached hereto as Appendix ("App.") A. The opinion of the United States District Court for the District of Minnesota was rendered on June 9, 1988, with a supplemental order for final judgment being issued on June 27, 1988. Both the district court's opinion and supplemental order are unreported and are attached hereto as App. B and C respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered on August 17, 1989. Petitioners timely filed a motion for rehearing with a suggestion for rehearing en banc, which was denied by the court of appeals on October 18, 1989. A copy of the court of appeals' order denying petitioners' motion is attached hereto as App. D. Petitioners have timely filed this petition for a writ of certiorari, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes are quoted in App. E:

Sherman Antitrust Act, §§ 1, 2, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2 (1988).

92 Stat. 1731, 49 U.S.C. App. § 1384 (1988).

STATEMENT OF THE CASE

The law of "antitrust injury," particularly in actions brought by competitors claiming damage from mergers, is in a state of turmoil. The circuits are in conflict, and decisions of this Court are misapplied. In this very case, the Eighth Circuit divided two to one, Senior District Judge Earl R. Larson dissenting, with Judge Theodore McMillian voting for en banc rehearing.

This petition presents the question of when a plaintiff competitor, here in the airline industry, demonstrates sufficient antitrust injury to maintain an action against a defendant that has secured a monopoly by merger and thereafter used its monopoly power to exclude the plaintiff. The court of appeals majority held that petitioners had failed to demonstrate sufficient antitrust injury because their exclusion from the market was not the type of injury the antitrust laws were intended to prevent and did not flow from that which made respondents' conduct unlawful—an issue neither raised nor considered by the district court. In so ruling, the

court of appeals majority misapplied this Court's decisions regarding antitrust injury and monopolization. Unless review is granted by this Court, the decision of the court of appeals majority will stand as an improper precedent for defining antitrust injury, and will further contribute to the confusion and conflict already existing among the circuits on this issue.

Respondent Northwest Airlines, Inc. is a major air carrier providing air passenger and air cargo transportation services throughout the United States, as well as internationally. Respondent NWA, Inc., the parent company of Northwest Airlines, Inc., is a holding company created to hold the shares of Northwest and several other entities unrelated to this action.[1] On August 12, 1986, Northwest obtained a monopoly at the air traffic hubs of Detroit, Minneapolis-St. Paul, and Memphis by acquiring its largest competitor in these markets, Republic Airlines, Inc., despite opposition by the Antitrust Division of the Department of Justice. *Fischer v. NWA, Inc.*, 883 F. 2d 594, 602, 604-05 (8th Cir. 1989) (Larson, J., concurring in part, dissenting in part). This lawsuit arises out of the effects of that acquisition in the Detroit hub.

Respondent Simmons Airlines, Inc. ("Simmons") is a corporation organized and operating under the laws of the State of Illinois, and at one time provided commuter air carrier service for Northwest at Detroit. Simmons had provided commuter service for Republic at Detroit prior to Northwest's purchase of Republic. Simmons was acquired by American Airlines while this matter was pending in the court of appeals.

Petitioners are the former shareholders of Fischer Bros. Aviation, Inc. ("Fischer Bros."), an Ohio corporation based in Galion, Ohio.[2] For approximately

[1] These respondents will collectively be referred to as "Northwest."

[2] Because the relevant events occurred while petitioners were operating as Fischer Bros., petitioners will collectively be referred to herein as "Fischer Bros."

40 years. Fischer Bros. provided commuter air carrier service to Ohio and Michigan markets. In May, 1987, during the pendency of this lawsuit, Fischer Bros. was sold to Midway Airlines, Inc., except for the claims asserted in this lawsuit, and went out of business.

The United States Department of Transportation ("DOT") approved Northwest's acquisition of Republic on August 12, 1986. In December of 1985, Northwest had entered into a written agreement with Fischer Bros. under which Fischer Bros. was providing exclusive commuter air service as a Northwest Airlink carrier on certain Detroit city-pairs. Northwest had entered into this arrangement with Fischer Bros. in order better to compete with Republic, which had a similar agreement with Simmons, which provided exclusive commuter service as Republic Express for many of the same city-pairs. As a consequence of Northwest's acquisition of Republic, Northwest found itself with exclusive commuter carrier agreements for the same markets with both Fischer Bros. and Simmons, as well as a minority stock interest in Simmons formerly held by Republic. 883 F.2d at 595-96.

Faced with these apparently conflicting obligations, Northwest directed Fischer Bros. to agree with Northwest and Simmons on a division of markets, or, alternatively, a sale to Simmons. When Fischer Bros. failed to reach agreement on a market division or sale to Simmons, Northwest terminated its commuter carrier agreement with Fischer Bros., effective March 24, 1987. Fischer Bros. at all times provided satisfactory service as a Northwest commuter. 883 F.2d at 596, 602-03.

Because of market conditions and the effects of the Northwest acquisition of Republic, Fischer Bros. was excluded from the Detroit market and unable to remain in business following its termination by Northwest. Evidence of record, undisputed, established that for a commuter carrier to compete at an airline hub, affiliation with a major carrier, such as Northwest, was essential, in order to gain access to a major carrier's computerized

reservation facilities and marketing strength. Due to Northwest's monopoly at Detroit, acquired by the purchase of Republic, Fischer Bros. had no means of re-entering the Detroit market after its termination by Northwest, because there was no other major carrier at Detroit with which Fischer Bros. could affiliate. 883 F.2d at 604 (Larson, J., concurring in part, dissenting in part).

In the course of seeking DOT approval for the Republic acquisition, Northwest repeatedly represented to the DOT that Northwest was in competition with commuter carriers, such as Fischer Bros. and Simmons, and that such competition would ensure that Northwest's acquisition of Republic would not result in a monopoly or unreasonable restraint of trade. *Id.* at 602 (Larson, J., concurring in part, dissenting in part). Because of its monopoly at Detroit, however, obtained through the Republic acquisition, Northwest was in fact able to exclude Fischer Bros. permanently from that market.

The evidence of the course of dealings among Northwest, Simmons, and Fischer Bros. demonstrates that the termination of Fischer Bros. resulted solely from the refusal of Fischer Bros. to accede to the anti-competitive demands of Northwest, and that Fischer Bros.' termination was a product of concerted action by Northwest and Simmons. In particular, the evidence shows:

In September, 1985, Fischer Bros. began negotiating its Airlink arrangement with Northwest, which was desirous of offering commuter service to compete with the Republic-Simmons service on Detroit city-pairs. Fischer Bros. had been operating as a commuter air carrier for USAir, but terminated its relationship with USAir to contract with Northwest. Northwest and Fischer Bros. executed their agreement on December 23, 1985. Fischer Bros. began providing Northwest Airlink service for Detroit city-pairs on February 1, 1986. The agreement provided that Fischer Bros. would be the exclusive commuter carrier for Northwest for Detroit

city-pairs unless Fischer Bros. declined or failed to provide service within 180 days of a request by Northwest. The agreement also permitted either party to terminate on six months' notice with or without cause. 883 F.2d at 595-96, 602.

While it was negotiating the Airlink agreement with Fischer Bros., Northwest was also negotiating to acquire Republic, its chief competitor in Detroit and other hubs. On December 26, 1985, three days after signing the Fischer Bros. Airlink agreement, Northwest began its final round of talks with Republic, leading to a January 23, 1986, agreement and plan of merger, subject to DOT approval. Northwest informed its commuter carriers, including Fischer Bros., that they would continue to "play a major role" in the merged operations, with expanded opportunities after the merger. 883 F.2d at 602 (Larson, J., concurring in part, dissenting in part).

Although no airline opposed the merger,[3] the Antitrust Division of the United States Department of Justice did. In response to Justice Department arguments of decreased competition after the merger, Northwest specifically argued to the DOT that the merger would not reduce competition since commuter carriers, among others, would continue to compete against the merged entity. The DOT approved the Northwest/Republic merger on August 12, 1986, but specifically withheld any grant of antitrust immunity under 49 U.S.C. App. § 1384. Indeed, in seeking DOT approval, Northwest expressly represented that it was not requesting antitrust immunity. 883 F.2d at 602, 604-05, 608 (Larson, J., concurring in part, dissenting in part).

---

[3]The president of Simmons agreed that Northwest's representations concerning commuter service after the merger "were a factor" in Simmons' decision not to oppose the merger before the DOT. 883 F.2d at 602 n.3 (Larson, J., concurring in part, dissenting in part).

Following DOT approval, Northwest scheduled combined operations to commence October 1, 1986. In anticipation of the consolidation Northwest presented commuter carriers for the two airlines, including Fischer Bros. and Simmons, with a plan for allocating city-pairs, so that after consolidation the commuter carriers and Northwest would not compete with each other. Both Simmons and Fischer Bros. rejected Northwest's initial proposal of September 8, 1986. Fischer Bros. thereafter unsuccessfully submitted a counterproposal to Northwest and Simmons that called for any market division to be determined through competition and not by agreement between Fischer Bros. and Simmons. Simmons requested Northwest to exclude Fischer Bros. from all city-pairs served by Simmons. 883 F.2d at 602 (Larson, J., concurring in part, dissenting in part).

At this point, George A. Rasmusson, who had been Republic's Director of Regional Airline Programs and who was employed after the merger by Northest in that same capacity, became involved in the Fischer Bros./Simmons market division negotiations. During his tenure at Republic, Rasmusson had worked closely with Joel Murray, Simmons' chairman, and was an admitted "drinking buddy" of Peter Piper, Simmons' executive vice president. 883 F.2d at 602 (Larson, J., concurring in part, dissenting in part).

Rasmusson met with the principals of both Fischer Bros. and Simmons on September 11, 1986. After unproductive discussion on how to divide markets, Simmons offered to purchase Fischer Bros. for $3.3 million. Fischer Bros. was forced to consider the proposal, which also received the support of Northwest. Fischer Bros. and Simmons entered into negotiations, began drafting documents, and scheduled a final negotiating session for September 22-23, 1986, in Chicago. 883 F.2d at 596, 602-03.

On September 22, however, Simmons changed its position with respect to several key aspects of the transaction, so that the deal was no longer acceptable

to Fischer Bros. Without the prior knowledge or consent of Fischer Bros., Rasmusson attended the negotiations at the invitation of Simmons. On the evening of September 22, after negotiations had adjourned for the day, Rasmusson dined with Piper and Murray of Simmons. When the negotiations failed to progress the next day, the participants departed, Rasmusson to Minneapolis, and Fischer Bros. to Ohio, to consider Simmons' proposals. 883 F.2d at 602-03 (Larson, J., concurring in part, dissenting in part).

On September 24, Fischer Bros. received, without advance warning, a notice from Simmons that it was withdrawing all offers of purchase, *followed within hours by a notice from Northwest* that it was terminating Fischer Bros.' Airlink agreement effective March 24, 1987. 883 F.2d at 603 (Larson, J., concurring in part, dissenting in part).

Other evidence surrounding the termination further supports the inference of concerted action. Rasmusson initially testified that he had met with his superior, A.B. Magary, on September 24, recommended termination of Fischer Bros., and received Magary's approval. Rasmusson also testified that Magary said that "he would handle the logistics of the notification." Magary, however, testified that he was out of the country from September 19 to the evening of September 25 and did not participate in the decision to terminate Fischer Bros. He claimed that the "decision on how to handle the contracts was really pretty much left to the lawyers." In this case, the lawyer was one of Northwest's in-house counsel, Terry Hall. 883 F.2d at 603 (Larson, J., concurring in part, dissenting in part).

After Magary was deposed, Rasmusson changed his deposition testimony to state that he had met on September 24 with Hall and recommended Fischer Bros.' termination. Rasmusson also changed his testimony to state that Hall had approved and accepted the recommendation. Hall, however, denied any participation in the decision to terminate Fischer Bros. He said that his only involvement was drafting the termination notice

at Rasmusson's request. 883 F.2d at 603 (Larson, J., concurring in part, dissenting in part).

Hall also originally testified that when he drafted the termination notice, he knew that Simmons had been negotiating with Fischer Bros., that the negotiations had broken down, and that Simmons had withdrawn its offers of purchase. On reading and signing his deposition, Hall then changed his testimony to state that he was aware only that negotiations between the parties had "broken down." Fischer Bros. did not contact Northwest from the time Rasmusson left the meeting in Chicago on September 23 until Fischer Bros. received the termination notice on September 24. 883 F.2d at 603 (Larson, J., concurring in part, dissenting in part).

Fischer Bros. brought suit against Northwest and Simmons in the United States District Court for the District of Minnesota. The complaint alleged claims under the federal antitrust laws and several common law claims. The antitrust claims challenged the Northwest/Republic merger and the actions taken by Northwest, both unilaterally and in concert with Simmons, following the merger.

At the close of discovery, Northwest and Simmons moved for summary judgment on all claims. On June 9, 1988, the district court, The Honorable Donald D. Alsop, granted the motion. The court held, as to the antitrust claims, that Fischer Bros. could not challenge the Northwest/Republic merger because it had been approved by the DOT, and that there was insufficient evidence of concerted action between Northwest and Simmons.[4] The court did not consider whether Fischer Bros. lacked sufficient "antitrust injury" to assert its claims. Nor did the court expressly rule on Fischer Bros.' claim that Northwest's unilateral conduct constituted

---

[4]The district court also granted summary judgment on the ground that an arbitration clause barred the common law claims. Fischer Bros. does not seek review of that ruling in this Court.

monopolization or an attempt to monopolize in violation of Section 2 of the Sherman Act—claims the court simply dismissed without discussion.

Fischer Bros. properly appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit. On August 17, 1989, in a two-to-one decision, the court of appeals affirmed the district court's grant of summary judgment on Fischer Bros.' antitrust claims, but on a ground entirely different from those relied upon by the district court. The court of appeals majority ruled that Fischer Bros. had not and could not establish sufficient "antitrust injury" to allow it to proceed with its antitrust claims.[5] The majority did not consider either of the issues decided by the district court: DOT approval as a bar to this action, or the sufficiency of the evidence to show concerted action. Rather, the majority ruled that because the agreement between Northwest and Fischer Bros. permitted termination without cause on six months' notice, Fischer Bros.' termination by Northwest "was not caused by anti-competitive conduct or an anticompetitive effect of such conduct." 883 F.2d at 600. The majority concluded that Fischer Bros.' termination "was caused by Northwest's need to avoid employing two regional airlines where only one was required." *Id.* The majority based this holding on its determination that Fischer Bros. was not "a competitor injured by Northwest's acquisition of monopoly power (roughly 75% of the Detroit market)." *Id.*

The Honorable Earl R. Larson, sitting by designation, dissented with respect to the majority's disposition of Fischer Bros.' antitrust claims. Judge Larson concluded that the facts of record

> constitute sufficient evidence of 'antitrust injury' to withstand a motion for summary judgment both with respect to [Fischer Bros.'] challenge

[5]The court of appeals also affirmed the district court's grant of summary judgment on Fischer Bros.' common law claims, a ruling that is not part of this petition.

> to the Northwest-Republic merger and with respect to [Fischer Bros.'] claims of a conspiracy between Northwest and Simmons to restrain trade and to monopolize the Detroit regional market.

883 F.2d at 604. Finding the evidence sufficient to establish concerted action between Northwest and Simmons to restrain competition and exclude Fischer Bros., Judge Larson concluded that "the injury to Fischer Bros. is direct, is accompanied by an improper motive, and is clearly the type of injury to competition which the antitrust laws were intended to prevent." *Id.* Judge Larson observed that "neither defendant even advanced the argument that lack of injury precluded [Fischer Bros.'] conspiracy claims." *Id.* Judge Larson then additionally determined that the district court had improperly dismissed Fischer Bros.' claims against Northwest's acquisition of Republic; Judge Larson found that DOT approval was in no sense a bar to any claims in this action challenging the merger or any anticompetitive effects of the merger. 883 F.2d at 605-08.

On August 25, 1989, Fischer Bros. petitioned the court of appeals for rehearing, with a suggestion for rehearing en banc. The court of appeals denied the petition on October 18, 1989, with The Honorable Theodore McMillian voting in favor of en banc reconsideration.

REASONS FOR GRANTING THE PETITION

I. Introductory Statement.

Fischer Bros. is out of business because Northwest obtained a monopoly through the acquisition of Republic. Because Northwest acquired Republic, Northwest found itself with what it considered to be conflicting contractual obligations. Had Northwest not acquired Republic, Northwest would never have been in this position; instead, Northwest, Republic, Simmons, and Fischer Bros. would have been in competition in

the Detroit market. Because Northwest acquired Republic, Northwest obtained a monopoly in Detroit giving Northwest (1) the power to require Fischer Bros. to divide markets or sell out to its competitor, Simmons, and (2) the power to terminate and exclude Fischer Bros. permanently from the Detroit market when Fischer Bros. failed to comply with Northwest's demands.

The threat to competition from a merger is that it will create market or monopoly power that will permit the merged entity to exclude smaller rivals. *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552-53 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270, 277-78 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 321, 362-63 (1963). This is exactly what happened in this case. For the Eighth Circuit majority to say that Fischer Bros. has not suffered antitrust injury is wrong and absurd. The majority decision, if permitted to stand, misinterprets decisions of this Court, adds further confusion to the law of antitrust injury in the area of mergers, and constitutes a gross miscarriage of justice that thwarts the private enforcement of the antitrust laws not only in this case but in others.

This Court should grant certiorari in this case to make clear that when a merger creates a monopoly accompanied by both the circumstances and the power to exclude competitors form the market, then those competitors that are thereafter excluded indeed sustain antitrust injury sufficient to challenge both the underlying merger and the conduct made possible by the merger.

II. Certiorari Should Be Granted to Clarify the Law of Antitrust Injury and Resolve Conflict Among the Circuits.

Fischer Bros. asks this Court to grant its petition in order to clarify the law of antitrust injury in merger cases such as this, where an acquisition creates both the occasion and the power to exclude competition, which is then accomplished by anticompetitive means

rather than by legitimate competition or increased efficiency. Clarification is necessary to resolve conflict between the circuits over the proper principles to apply in determining when antitrust injury eventuates, and to instruct the lower federal courts on the correct application of these principles. In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), this Court held that a competitor failed to establish antitrust injury sufficient to enjoin a merger when it could show a threat of harm only from increased competition. This Court should not permit lower federal circuits improperly to extend that ruling to bar actions by competitors that have actually been excluded from a market, post-merger, by anticompetitive means employed because of circumstances resulting from the merger, and made effective because of monopoly power created by the merger.

While there has been a general proliferation of mergers in the United States in the past decade, the number and effect of these mergers have perhaps been nowhere more significant than in the commercial airline industry. As reported by one industry survey in the fall of 1989:

> [T]he top eight airlines now account for 90% of domestic airline traffic, versus 15 carriers in 1984 and 11 in 1979. More significant has been the substantial change in the level of competition at a number of the major hub airports. In 1988, a single carrier dominated more than 75% of the departures at six major hubs; no hub was this monopolized in 1984. Additionally, 20 of the 27 largest hubs in 1988 had two carriers that accounted for 50% or more of their departures. In 1984, there were only nine hubs that had this degree of concentration.

Value Line Investment Survey, at 251 (September 29, 1989).

Mergers within the airline industry have led to enormous market shares for the merged entities. For

example, after Northwest's acquisition of Republic, Northwest became the fifth largest airline in the United States, with a market share in Detroit of "roughly 75%." 883 F.2d at 600. This and other courts have characterized a market share of this magnitude as a sufficient basis in and of itself to support a finding of monopolization. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see Dimmitt Agri Industries, Inc. v. CPC International, Inc.*, 679 F.2d 516, 528 n.11 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122, 129 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981). This is particularly so when such a share has been obtained by acquisition, rather than by natural growth and efficiency. *Grinnell*, 384 U.S. at 576; *United States v. Yellow Cab Co.*, 332 U.S. 218, 227-28 (1947); *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945).

The effects of mergers such as that in this case have been severe and adverse for both consumers and competitors. Prices have risen; service has been reduced; the quality of service has deteriorated; competition has diminished; and competitors, such as Fischer Bros., have been excluded. 883 F.2d at 604 (Larson, J., concurring in part, dissenting in part). So harmful to the public have airline mergers been that Senator Howard M. Metzenbaum has recently introduced a bill to re-regulate the airline industry. *See* S. 1854, 101st Cong., 1st Sess. (1989).

Yet who is to challenge these mergers and their effects under the antitrust laws if not competitors? Although affected, consumers generally lack both the financial stake and the economic resources to undertake such litigation. The class action bar has not come to the forefront in this area. Nor, in the 1980s, has the United States Government. Thus, not surprisingly, challenges to such mergers, and those within other industries, have generally come from competitors. *See, e.g., Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), *appeal dismissed*, 58 U.S.L.W. 3154 (September 5,

1989); *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir.), *cert. denied*, 58 U.S.L.W. 3186 (October 2, 1989); *South Dakota v. Kansas City Southern Industries, Inc.*, 1989-1 Trade Cas., Par. 68,635 (8th Cir.), *appeal docketed*, 58 U.S.L.W. 3336 (November 21, 1989); *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250 (E.D. Pa. 1987). In view of this Court's longstanding commitment to the importance of private enforcement of the antitrust laws, *see American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 569, 572-73 n.10 (1982); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-40 (1968), such actions by competitors against these serious market evils ought to be encouraged, not foreclosed by artificial and sophistical limitations of antitrust injury and standing.

Yet these challenges to clearcut acts of monopolization have been invariably met with defenses premised on the alleged absence of antitrust injury or standing. The Second Circuit and the Eastern District of Pennsylvania have liberally interpreted these antitrust injury and standing requirements. *See Consolidated Gold Fields PLC*, 871 F.2d 252; *R.C. Bigelow, Inc.*, 867 F.2d 102; *Tasty Baking Co.*, *653* F. Supp. 1250. The Fifth and Eighth Circuits, however, have applied much narrower, more stringent, and conflicting requirements, and have denied competitors, such as Fischer Bros., standing to challenge mergers of their competitors. *See Fischer v. NWA, Inc.*, 883 F.2d 594 (8th Cir. 1989); *Phototron Corp.*, 842 F.2d 95.

The conflict among the circuits appears most vividly from the *Phototron* and *R.C. Bigelow* decisions. In *Phototron*, the Fifth Circuit concluded that this Court's decision in *Cargill* had "undermined" the "facially sensible proposition" that "the competitor of a monopolist always has standing to challenge the monopolistic conduct forcing it from the market." 842 F.2d at 100. Based on its reading of *Cargill*, the Fifth

Circuit reversed a preliminary injunction obtained by a competitor against a merger. *Id.* at 102. In *R.C. Bigelow*, finding standing and antitrust injury in a similar situation, the Second Circuit simply rejected and declined to follow the Fifth Circuit's decision in *Phototron*. 867 F.2d at 109. In *Consolidated Gold Fields PLC*, the Second Circuit further held that a target of a proposed anticompetitive merger demonstrates sufficient antitrust injury and standing on a showing that the acquiring company intends to limit the target's ability to compete after the merger. 871 F.2d at 258. Now, going beyond even the Fifth Circuit in *Phototron*, the Eighth Circuit has taken a giant and confusing step backward, throwing the issue of antitrust injury into even more of a muddle. When appellate courts interpret this Court's decisions as undermining "facially sensible proposition[s]," intervention is essential to provide direction in the administration of justice.

Here, an anticompetitive merger has created both the occasion and the power to exclude competition; and exclusion has in fact been effectuated by anticompetitive means (a conspiracy) having an anticompetitive purpose and effect (division of markets and foreclosure of competition). On these facts, who other than the excluded party can have standing and antitrust injury? Yet, the Eighth Circuit majority has said no to Fischer Bros., the excluded competitor. Confusion reigns, and should not in this area so plainly within the reach and remedy of the antitrust laws.

Moreover, it is important for this Court to clarify that competitors are a "protected class" under the antitrust laws, and to elucidate the circumstances under which competitors sustain antitrust injury sufficient to challenge a merger and its effects. This Court began down that road in *Cargill*, rejecting the flat rule urged by the Justice Department that competitors should never be accorded standing to challenge mergers. 479 U.S. at 120-22. The Eighth Circuit majority, however, has now in effect taken the step that this Court forbade.

Although this Court has said that the antitrust laws were enacted for the protection of competition, not competitors, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), this and other courts have also repeatedly recognized that Congress made a conscious choice, in enacting the antitrust laws, to preserve an economic system in which small competitors would be assured the right to compete, sometimes even at the expense of overall economic efficiency. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962):

> It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

United States v. Von's Grocery Co., 384 U.S. 270, 274-75 n.7, n.10 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213-14 (1959); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 386 (1956); *Standard Oil Co. v. United States*, 221 U.S. 1, 50, 83-84 (1911); *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 324 (1897); *Aluminum Co. of America*, 148 F.2d at 428-29 n.1; *United States v. Corn Products Refining Co.*, 234 F. 964, 1011-12 (S.D.N.Y. 1916). Many of the foregoing authorities may indeed be venerable with age. For that very reason, however, because of their proximity in time to the passage of the antitrust laws, they accurately express the concern of Congress for the protection and preservation of individual competitors. *See* Hovenkamp, **Antitrust's Protected Classes**, 88 Mich. L. Rev. 1, 44-46 (1989); *see also Brown Shoe Co.*, 370 U.S. at 315-16. Further, this Court has more than once stressed that Section 4 of the Clayton Act "does not confine its protection to

consumers, or to purchasers, or to competitors, or to sellers. ... The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 472 (1982) (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948)). The Eighth Circuit majority has failed to heed this Court's admonition.

So that the lower federal courts will not lose sight of these important principles, but will be guided by them in a consistent and unified application of the antitrust laws, this Court should grant the petititon for certiorari in this case.

III. Certiorari Should be Granted to Review the Eighth Circuit Majority's Misapplication of This Court's Decisions.

In ruling that Fischer Bros. failed to establish antitrust injury, the court of appeals majority misapplied this Court's established standards for determining when a party has suffered "antitrust in-jury" and for analyzing the conduct of a monopolist. The result is a decision that conflicts with decisions of this Court and other federal jurisdictions and is already being distinguished in similar cases within the Eighth Circuit.

The dissent in this case by Judge Larson correctly states and applies the law. If only to adopt and ratify the views of Judge Larson, so as to prevent a manifest miscarriage of justice, this Court should grant the petition for certiorari, as it has done on numerous past occasions where Judge Larson's views have been rejected by lower courts.

On three other occasions where Judge Larson, sitting by designation, has dissented, this Court has granted certiorari and adopted his views. *See Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982) (reversing 643 F.2d 553 (9th Cir. 1980)); *Aronson v. Quick Point Pencil Co.,* 440 U.S. 257 (1979) (reversing

567 F.2d 757 (8th Cir. 1977)); *United States v. Hasting*, 461 U.S. 499 (1983) (reversing 627 F. 2d 110 (7th Cir. 1980)). Twice, where the Eighth Circuit has reversed decisions of Judge Larson in the District of Minnesota, this Court has granted certiorari and sustained Judge Larson. *See United States v. Naftalin*, 441 U.S. 768 (1979) (reversing 579 F.2d 444 (8th Cir. 1978)); *Randall v. Loftsgaarden*, 478 U.S. 647 (1986) (reversing 675 F.2d 168 (8th Cir. 1982), and 768 F.2d 949 (8th Cir. 1985)). As with these previous decisions, Judge Larson's correct analysis of the issue of antitrust injury in this case warrants a grant of certiorari.

The court of appeals majority stated the law of "antitrust injury" to require that:

> [P]laintiff must establish that 'there was ... proximate causation between plaintiff's harm and the alleged illegal market restraint.' ... Unless it can establish that its alleged injury was caused by conduct that violates the antitrust laws, a plaintiff lacks standing under Section 4 of the Clayton Act, to bring an antitrust lawsuit.

883 F.2d at 599 (quoting *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir. 1983)).

The majority then grossly misapplied this standard, beginning with an unsupported finding that Fischer Bros. was not a "competitor" of Northwest. According to the majority, "Fischer does not contend that it was a customer of Northwest forced to pay increased prices, nor was Fischer a competitor injured by Northwest's acquisition of monopoly power (roughly 75% of the Detroit market)." *Id.* at 600. Nothing could be further from the truth.

As shown by Judge Larson's dissent, substantial evidence in the record demonstrates that Fischer Bros. was indeed a competitor of Northwest, and was injured by Northwest's acquisiton of monopoly power. As pointed out by Judge Larson, Fischer Bros. presented substantial evidence that it was a competitor of

Northwest, including repeated statements by Northwest to the DOT to the effect that Northwest was in competition with commuter carriers such as Fischer Bros., and that competition from commuter carriers was a ground for approving Northwest's acquisition of Republic. 883 F.2d at 604. In the face of such evidence, the majority could not properly resolve this genuine issue of material fact against Fischer Bros.

The majority also concluded "that Fischer's termination was not caused by anticompetitive conduct or an anticompetitive effect of such conduct; rather, it was caused by Northwest's need to avoid employing two regional airlines where only one was required." *Id.* at 600. This conclusion both misapplied the law of antitrust injury and improperly resolved issues of fact.

Northwest was in the position of having to choose between regional carriers only because of its acquisition of Republic in order to obtain a monopoly at Detroit and other hubs. Moreover, the majority's assumption that "only one [regional carrier] was required" at Detroit impermissibly adopts Northwest's view that monopoly is an acceptable *desideratum*. Would the majority likewise conclude that before Northwest bought Republic, there were too many carriers serving Detroit? Finally, the majority wholly ignores, improperly, Northwest's termination of Fischer Bros. by anticompetitive means, a conspiracy with Simmons to divide markets and foreclose competition. Unlike *Monfort of Colorado,* Fischer Bros. is not complaining here of exclusion because of increased competition and efficiency. Fischer Bros. is no victim of vigorous competition. Rather, Fischer Bros. is complaining of exclusion resulting from decreased competition and monopoly (Northwest's purchase of Republic) and implemented by anticompetitive means (a conspiracy with Simmons). This is the essence of antitrust injury.

Judge Larson in dissent saw this clearly. As Judge Larson pointed out, more than sufficient evidence exists to "create a factual dispute concerning whether Simmons

and Northwest agreed to eliminate Fischer Bros. from the Detroit regional market." *Id.* at 603. An agreement between Northwest and Simmons to eliminate Fischer Bros., followed by termination in furtherance of such an agreement, is of course a termination caused by anticompetitive conduct. As Judge Larson correctly concluded, "[t]o withstand a motion for summary judgment, plaintiff must show 'the inference of conspiracy is reasonable in light of the competing inference of independent action.' [Citing *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1985)]. Plaintiff's evidence does precisely that." *Id.* at 603 n.5. For the majority to have ignored this evidence was inexplicable and impermissible. As pointed out by Judge Larson, "At this stage of the proceedings ... plaintiff is entitled to all reasonable inferences from the evidence presented and need only establish a genuine issue of material fact with regard to the existence of antitrust injury. *See R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 107-11 (2d Cir. 1989); *In re Worker's Compensation Insurance Antitrust Litigation*, 867 F.2d at 1560." *Id.* at 604.

Had the majority correctly applied the law to the evidence of record, the majority would have found more than sufficient evidence to show that Fischer Bros.' termination resulted from a conspiracy between Northwest and Simmons to eliminate Fischer Bros. in the Detroit market. As the victim of such a conspiracy, Fischer Bros. without question established an antitrust injury.

> Assuming Fischer Bros. can prove its allegations of a conspiracy between Northwest and Simmons to eliminate Fischer Bros. as a competitor in the Detroit regional market, the injury to Fischer Bros. is direct, is accompanied by an improper motive, and is clearly the type of injury to competition which the antitrust laws were intended to prevent. Indeed, neither defendant even advanced the argument that

> lack of injury precluded plaintiff's conspiracy claims.

Id. (Larson, J., concurring in part, dissenting in part).

Further, Fischer Bros.' termination was also an anticompetitive effect of anticompetitive conduct—Northwest's acquisition of Republic. Again, the majority ignored the evidence of record, which Judge Larson correctly characterized:

> Fischer Bros. contends it was harmed by the merger as a competitor at the Detroit "hub," because the merger gave Northwest sufficient market power at Detroit (75% of enplanements) to force Fischer Bros. from the market and to prevent its reentry. Fischer Bros. presented evidence that affiliation with a major carrier is essential to the survival of a commuter carrier, and that after the merger Northwest was essentially the only major carrier with a presence at Detroit.

Id. "[A] competitor does have standing to challenge a merger which will result in monopoly power where there is also an allegation of post-merger predatory conduct such as predatory pricing or other predatory non-price strategies." *Id.* at 605; *see Consolidated Gold Fields PLC*, 871 F.2d at 257-58; *R.C. Bigelow, Inc.*, 867 F.2d at 111; *Kansas City Southern Industries, Inc.*, 1989-1 Trade Cas., at p. 61,351.

The evidence in the record fully demonstrated that Northwest's termination of Fischer Bros. was a predatory act made possible by Northwest's acquisition of monopoly power through the Republic merger. As Judge Larson observed:

> No presumption of post-merger predatory conduct is needed in this case, because Fischer Bros. alleges Northwest actually used its post-merger monopoly power to eliminate Fischer Bros. as a competitor in the Detroit regional market. The elimination of a competitor

> through predatory acts is "antitrust injury." [Citing *Consolidated Gold Fields PLC*, 871 F.2d at 257-58.] ...
>
> The majority cites Northwest's ability to terminate Fischer Bros. on six months' notice, arguing Northwest would have terminated Fischer Bros. regardless of its post-merger market share because it was faced with two overlapping commuter services. But Northwest's monopoly power is precisely, according to plaintiff, why Northwest was able successfully to eliminate *competition* when it conspired with Simmons to eliminate Fischer Bros. as a competitor. Fischer Bros.' termination, in this case, constitutes "antitrust injury" because plaintiff has presented sufficient evidence to raise an inference that Northwest did not simply terminate Fischer Bros.; it used its market power in combination with another competitor to reduce competition at the Detroit hub.

Id. at 605 (emphasis in original).

Moreover, the majority opinion overlooked well established law that even a purely unilateral termination or refusal to deal is not immune under the antitrust laws if undertaken in furtherance of a monopoly, or an attempt to monopolize, or an effort to create some other substantial restraint of trade. *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 601-02 (1985); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625 (1953); *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951); *Associated Press v. United States*, 326 U.S. 1, 15 (1945). As the Eighth Circuit itself has stated in *General Industries Corp. v. Hartz Mountain Corp.*:

> There is little doubt that an individual manufacturer has the freedom to exercise its own independent discretion as to the parties

> with whom it will deal, but that right is not unrestricted. Although a refusal to deal, without more, does not violate the antitrust laws, the Supreme Court has found that "[i]f accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal, have transgressed the Act."

810 F.2d 795, 802 (8th Cir. 1987) (quoting *Times-Picayune Publishing Co.*, 345 U.S. at 625).

Inexplicably, the court of appeals majority neglected to apply this law to a situation to which it was clearly applicable. The evidence, not merely substantial but virtually undisputed, was that Northwest terminated Fischer Bros. for refusing to divide markets with or sell out to Simmons. Such a market division constitutes a per se violation of Section 1 of the Sherman Act. *See United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1242-44 (3d Cir. 1975). In any event, the purpose and effect of either a market division or a sale to Simmons, and certainly of Fischer Bros.' termination, were to eliminate competition and preserve and secure Northwest's monopoly at Detroit. Thus, the termination was both an anticompetitive act, and a direct effect of anticompetitive conduct. The majority's disregard of this well-established body of law was plainly error that this Court should not permit to go uncorrected.

The majority's decision in this case has had the effect of creating a conflict in the law of antitrust injury not only among the federal circuits, but even within the Eighth Circuit itself. The United States District Court for the District of Minnesota has already been forced to distinguish the majority's opinion on the issue of antitrust injury in a similar case involving Northwest arising out of the Northwest/Republic merger and another Northwest acquisition. *See International Travel Arrangers v. NWA, Inc.*, No. 3-86-0391, slip op. (D.

Minn., October 5, 1989) (Magnuson, J.) (copy attached as App. F hereto). In *International Travel Arrangers*, Judge Magnuson was forced to distinguish his case from the majority's opinion on antitrust injury in this case on the wholly unsupported ground that "the problem in *Fischer* was that Fischer was neither a customer nor a competitor of Northwest." *Id.* at 18. As shown, however, Fischer Bros. was a competitor, as Northwest itself admited in its statements to the DOT in order to obtain approval for the Republic acquisition. The result of the Eighth Circuit's opinion in this case is that courts under its own jurisdiction feel the need to distinguish the decision from other cases where the evidence is in fact the same. The long-term effect of such a result is confusion among the courts—including those within the same jurisdiction—over what constitutes sufficient evidence of antitrust injury. Such conflict should be avoided by granting the petition for certiorari.

IV. The Court Should Grant Certiorari in Order to Address the Issue of Antitrust Immunity Arising from DOT Approval of the Republic Acquisition.

Finally, this Court should grant certiorari in order to address the issue of implied antitrust immunity arising from DOT approval of Northwest's acquisition of Republic. The trial court in this case granted summary judgment in part because the court found DOT approval of the Republic acquisition to be a complete bar to any subsequent challenge to the merger under Sections 1 and 2 of the Sherman Act. Because of its finding of no antitrust injury, the Eighth Circuit majority did not reach this issue. Judge Larson's dissent, however, after finding sufficient antitrust injury, did reach the issue and rejected the trial court's conclusion. 883 F.2d at 605-08.

Review of this issue is necessary on the following grounds:

(1) Complete review of the majority opinion

ought to include this subsidiary issue, which will be left after this Court determines that Fischer Bros. has shown antitrust injury;

(2) The issue is important, particularly since "[i]mplied antitrust immunity is not favored," and "there is a heavy presumption against implicit exemptions" from the antitrust laws. *Abbott Laboratories v. Portland Retail Druggist Association, Inc.*, 425 U.S. 1, 11-12 (1976);

(3) The decision of the district court, having never been subject to appellate review, stands as a precedent, and has in fact already been followed. *International Travel Arrangers*, slip op., at 11-15; and

(4) The district court's finding of immunity is clearly erroneous.

The result of the district court's finding of immunity is that the courts have conferred on Northwest an antitrust immunity that Northwest expressly stated it was not requesting, that Congress did not intend to confer without an express finding by the DOT under 49 U.S.C. App. § 1384, and that the DOT never intended to confer and expressly withheld. This result is not merely wrong, but also a substantial impediment to private enforcement of the antitrust laws. As succinctly stated by Judge Larson, "where immunity is neither requested by the carrier nor granted by the agency, district courts should be free to entertain antitrust challenges such as the plaintiff has presented in this case." 883 F.2d at 608.

Fischer Bros. respectfully submits that this Court should grant certiorari to make this important principle clear in this and other cases.

CONCLUSION

For the reasons stated hereinabove, petitioners respectfully request that this Court grant their petition for a Writ of Certiorari.

Dated this 28th day of December, 1989.

Respectfully submitted,

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.
ALIOTO & ALIOTO

Counsel for Petitioners

Daniel R. Shulman
Joseph M. Alioto
George R. Wood

INDEX TO APPENDIX

APPENDIX A

William R. FISCHER,
The Estate of Betty L. Fischer,
Montford R. Fischer, and
Bonita G. Fischer, Appellants,
v.
NWA, INC.; Northwest Airlines, Inc.; and Simmons Airlines, Inc., Appellees.

No. 88-5258

United States Court of Appeals,
Eighth Circuit.

Submitted March 13, 1989.

Decided Aug. 17, 1989.

Rehearing and Rehearing En Banc
Denied Oct. 18, 1989.

Former stockholders in regional airline filed antitrust and common law claims against commercial airline with which it was party to exclusive regional service agreement and competitor providing similar connecting flight services for acquired airline. The United States District Court for the District of Minnesota, Donald D. Alsop, Chief Judge, entered summary judgment for defendants on all issues. On appeal, the Court of Appeals, Magill, Circuit Judge, held: (1) regional airline failed to establish that it suffered antitrust injury as result of acquisition and therefore lacked standing as antitrust plaintiff, and (2) regional airline's common law claims were barred by its failure to seek arbitration, in light of mandatory arbitration clause in agreement.

Affirmed.

Larson, Senior District Judge, sitting by designation, concurred in part and dissented in part and filed opinion.

1. Monopolies 28 (7.2)

Regional airline failed to establish that it suffered

antitrust injury as result of acquisition of another airline by airline with which it had contracted to provide connecting flight services and therefore lacked standing as antitrust plaintiff; regional airline's termination as acquiring airline's exclusive regional carrier was caused by need to avoid employing two regional airlines where only one was required, and both parties had power to terminate regional service agreement at will with six months notice. Clayton Act, § 4, 15 U.S.C.A. § 15.

2. Arbitration 8

Regional airline's common-law claims arising out of alleged breach of exclusive regional service agreement were barred by its failure to seek arbitraion, in light of mandatory arbitration clause in that agreement.

Daniel R. Shulman, Minneapolis, Minn., for appellants.

Frank J. Costello, Washington, D.C., for NWA.

Robert G. Foster, Chicago, Ill., for Simmons Airlines.

Before WOLLMAN and MAGILL, Circuit Judges, and LARSON,* Senior District Judge.

MAGILL, Circuit Judge.

Appellants William R. Fischer, et al., are former stockholders in Fischer Bros. Aviation (Fischer), an airline that provided regional connecting flight service for Northwest Airlines, Inc. (Northwest) at Detroit. In the district court,[1] Fischer asserted antitrust and common-law claims against Northwest and Simmons Airlines, Inc. (Simmons). The allegedly unlawful conduct by Northwest and Simmons stemmed from Northwest's 1987 acquisition of Republic Airlines, Inc. (Republic).

---

*THE HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

[1]The Honorable Donald D. Alsop, Chief Judge, United States District Court for the District of Minnesota.

Under a contract much like the Northwest/Fischer agreement, Simmons had provided connecting flight service for Republic at Detroit. Northwest and Simmons moved for, and the district court granted, summary judgment on all issues. On appeal, Fischer argues that the court erred in concluding that:

(1) Fischer could not challenge the Northwest/Republic combination because the U.S. Department of Transportation, by approving the acquisition, immunized it against future antitrust challenges;

(2) Fischer failed to present sufficient evidence of a Northwest/Simmons conspiracy to terminate Fischer; and

(3) because Fischer failed to seek redress under the mandatory arbitration clause in the Northwest/Fischer contract, all of Fischer's common-law claims are time-barred.

Having considered the district court's summary judgment order and the record on appeal, we affirm.

I.

On December 23, 1985, one month before the Northwest/Republic merger, Northwest and Fischer signed a regional airline service agreement.[2] The agreement provided that:

(1) Beginning February 1, 1986, Fischer would provide regional connecting flights from Detroit as a Northwest airlink. In other words, Northwest, a national airline, would provide flights between Detroit and other major cities. Then, Fischer, under the Northwest name, logo, etc., would provide connecting flights to smaller cities surrounding the Detroit metropolitan area.

(2) Fischer would act as Northwest's exclusive regional airline for all flights originating in Detroit unless Fischer declined to serve a particular route.

(3) Northwest would partially subsidize Fischer's

[2]Prior to its relationship with Northwest, Fischer had provided regional service for USAir in Detroit.

operation, in accordance with a prorated formula.

(4) Either party could terminate the agreement unilaterally, with or without cause, after providing six months notice.

(5) The sole mechanism for resolving disputes arising from the agreement would be arbitration.

The Northwest/Fischer agreement remained in effect for only thirteen months (February 1986-March 1987). It was terminated because of ramifications of Northwest's acquisition of Republic.

Northwest began to consider acquiring Republic in 1985. On January 23, 1986, one month after the Northwest/Fischer agreement was signed, Northwest and Republic announced publicly that Northwest intended to acquire Republic, if the transaction were approved by the U.S. Department of Transportation.

The planned acquisition created considerable friction in the Northwest/Fischer relationship because Republic also had an ongoing exclusive regional airline service contract for flights originating in Detroit. Republic and Simmons had an agreement, executed on December 26, 1984, similar to that between Northwest and Fischer. *Inter alia*, it provided that Simmons would be Republic's exclusive regional airline at Detroit unless Simmons declined to serve a particular route. Unlike the Northwest/Fischer agreement, however, the Republic/Simmons agreement had no subsidization arrangement and was not terminable at will with six months notice; rather, it stipulated that neither party could terminate it until October 1988. The two regional service contracts gave rise to a dilemma for the newly-created Northwest/Republic combination. The combination was saddled with two unequivocal, ongoing regional service contracts granting overlapping "exclusive" status to Fischer and Simmons for the Detroit regional market.[1]

[1]The acquisition of Republic also gave the new Northwest/Republic combination overlapping regional service contracts for the Twin Cities area, but the regional carriers there, Express I and Mesaba, reached a mutual agreement, without incident, to divide routes and share the market.

On August 12, 1986, the Department of Transportation approved Northwest's acquisition of Republic. Although the acquisition patently created a conflict between the Fischer and Simmons regional service agreements, Northwest confidently predicted that a compromise would be reached, accommodating the contractual rights of both regional carriers and permitting them to share the Detroit market. However, shortly after the acquisition received government approval, both of the regional airlines wrote to Northwest, indicating that they intended to enforce the exlusive rights provisions in their contracts.

In August 1986, Northwest convened Fischer and Simmons for a meeting in Minneapolis. Northwest encouraged them to carve out a mutually acceptable division of the Detroit market, stressing that although it wished to encourage negotiations leading to an acceptable compromise, it would limit itself to indirect involvement, leaving substantive negotiations to the two regional carriers.

The meeting was a failure. No agreement concerning division of the market was reached. Simmons then insisted that Northwest "write a check" for any routes Simmons was forced to surrender to Fischer. When Northwest refused to make such payments, Simmons asked Northwest if it would object if Simmons acquired Fischer. Northwest did not object, but efforts to create a Simmons/Fischer combination also failed.

Pursuant to its December 23, 1985 regional service contract with Fischer, Northwest sent notice of termination to Fischer on September 24, 1986. Prior to that date, numerous efforts to resolve the Fischer/Simmons conflict had failed. After the August meeting in Minneapolis, the parties' principals had several meetings and telephone conversations, and exchanged assorted correspondence. When Northwest sent notice of termination to Fischer, Simmons revoked its offer to purchase Fischer. Northwest then informed Fischer that Simmons was the permanent Northwest regional service

airline in Detroit and therefore it would have the right of first refusal for all regional Northwest flights from Detroit. Simmons began to serve as Northwest's regional airlink in Detroit on October 1, 1986. Until February 4, 1987, Northwest continued to negotiate toward a new agreement that would accommodate Fischer.[4] On that date, negotiations ended as Northwest learned that Fischer had retained an attorney and was preparing to sue Northwest for violating their 1985 agreement. On March 24, 1987, six months after Northwest provided Fischer's notice of termination, Fischer was terminated by Northwest. Later that year, Fischer (which, ironically, had enjoyed a 30% increase in passengers since Northwest's acquisition of Republic) was sold to Midway Airlines.

Although the 1985 Northwest/Fischer agreement, *see supra*, provided for arbitration of all disputes, controversies and claims arising from or related to the agreement, Fischer never sought arbitration of its grievances stemming from Northwest's acquisition of Republic. Instead, Fischer filed a lawsuit in the district court, asserting nine antitrust and common-law claims against Northwest, Simmons, or both. In its antitrust claims under the Sherman Act, Fischer asserted that:

(1) the acquisition of Republic was an unlawful contract or combination restraining trade in violation of Section 1;

(2) the acquisition of Republic attempted to or did create a monopoly in violation of Section 2;

(3) Northwest and Simmons conspired to restrain trade in violation of Section 1; and

(4) Northwest and Simmons conspired to monopolize or attempt to monopolize the Detroit regional connecting service airline market in violation of Section 2.

In its common-law claims, Fischer argued that:

---

[4]Such an agreement would provide Fischer with routes that Simmons, after being granted the right of first refusal, had declined to serve.

(1) Simmons tortiously interfered with the Fischer/Northwest contract;

(2) Simmons and Northwest conspired to interfere with Fischer's "prospective advantage;"

(3) Northwest fraudulently misrepresented its intention to perform its obligations under the Fischer/Northwest contract;

(4) Northwest breached its contract with Fischer by failing to comply with the exclusivity clause; and

(5) Northwest breached the covenant of good faith and fair dealing implied in the contract.

Northwest and Simmons moved for summary judgment on all claims. The court granted the motion and dismissed the entire action, holding that (1) Fischer's antitrust challenge to the acquisition of Republic was barred by the Department of Transportation's approval of the transaction; (2) Fischer failed to present sufficient evidence of a conspiracy to support allegations of an antitrust violation; and (3) Fischer's common-law claims were subject to the arbitration provision, and since no request for arbitration was made by Fischer within 120 days of the alleged breach of contract, the claims were time-barred.

We affirm the district court's granting of the defendants' motion for summary judgment. However, we find in favor of the defendants on partially different

grounds.[5] We hold that:

(1) Sumary judgment dismissing Fischer's antitrust claims was properly granted because Fischer failed to establish that it suffered an antitrust injury; and

(2) Summary judgment dismissing Fischer's common-law claims was properly granted because Fischer failed to seek arbitration.

II.

As the district court noted, the Supreme Court has recently "refined [the] application" of the standard for summary judgment under Rule 56 of the Federal Rules

[5]The Supreme Court has held that "[i]t is well accepted *** that without filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgement below." *Schweiker v. Hogan*, 457 U.S. 569, 585 n. 24, 102 S.Ct. 2597, 2607 n. 24, 73 L.Ed.2d 227 (1982) (citing *Blum v. Bacon*, 457 U.S. 132, 137 n. 5, 102 S.Ct. 2355, 2359 n. 5, 72 L.Ed.2d 728 (1982)). Therefore, in this appeal, Northwest and Simmons may properly rely on the issue of antitrust injury (which the district court chose not to decide) in seeking affirmance of the district court's summary judgment order. We affirm the order as it relatese to Fischer's antitrust claims on antitrust injury grounds alone. We are able to do so because antitrust injury is a threshold issue that plaintiffs must establish in order to have standing to sue under the antitrust laws. *See Midwest Communications v. Minnesota Twins*, 779 F.2d 444 (8th Cir.1985), *cert. denied*, 476 U.S. 1163, 106 S.Ct. 2289, 90 L.Ed.2d 730 (1986) (where plaintiff fails to show antitrust injury, it lacks standing to sue under the antitrust laws and the court need not reach the merits of its antitrust claims). *See generally* L.A. Sullivan, *Antitrust*, 770, 774. In light of *Midwest Communications*, we affirm the dismissal of Fischer's antitrust claims on grounds of lack of standing, so we need not examine the merits of the claims: specifically, whether Northwest and Simmons conspired to monopolize the Detroit market or to terminate Fischer, or whether the Republic acquisition was barred by the approval of the Department of Transportation.

of Civil Procedure.[6] *See Fischer v. NWA*, No. 3-87-CIV-106, slip op. at 6 (D.Minn. June 9, 1988). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the Court presented a thorough restatement of the summary judgment standard.

---

[6]Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the Supreme Court stated that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses ***." 477 U.S. at 323-24, 106 S.Ct. at 2553. Therefore, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole ***." *Id.* at 327, 106 S.Ct. at 2555.

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id.

The Court in Celotex then held that summary judgment must be granted where a party fails to make a sufficient factual showing regarding an essential element of its case:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

477 U.S. at 322-23, 106 S.Ct. at 2552.

Anderson emphasizes that "[o]nly disputes over facts that might affect the outcome of the suit *** will properly preclude the entry of summary judgment." *Id.* at 248, 106 S.Ct. at 2510. Further, it held that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-48, 106 S.Ct. at 2509-10. The Court then goes on to point out that the Rule 56 standard "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Id.* at 250, 106 S.Ct. at 2511 (citing *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943)). In this circuit, we have held that a district court must give the nonmoving party the benefit of all the reasonable inferences that can be drawn from the underlying facts. *Trnka v. Elanco Products*, 709 F.2d 1223 (8th Cir.1983).

III.

Moving to the substantive issues in this case, we begin with Fischer's antitrust claims. Fischer contends that Northwest's acquisition of Republic and the course of dealings between Northwest and Republic since the acquisition have violated Sections 1 and 2 of the Sherman Act. Specifically, Fischer alleges that since the acquisition, the appellees, together or separately, have conspired to restrain trade, conspired to monopolize the Detroit regional airline market, entered into an unlawful contract or combination in restraint of trade, and attempted to create a monopoly. The district court, stressing the government's approval of the acquisition and Fischer's failure to present sufficient evidence of conspiratorial action to raise a genuine fact issue, granted summary judgment in favor of Northwest and Simmons. We affirm the district court. However, we do so on different grounds: the failure of Fischer to

establish that it suffered an antitrust injury as a result of Northwest's acquisition of Republic.

In order to prevail under the Sherman and Clayton Acts, plaintiffs must carry a heavy burden of proof. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), the Supreme Court stated that antitrust plaintiffs:

> must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove an *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 489, 97 S.Ct. at 697.

In *McDonald v. Johnson & Johnson*, 722 F.2d 1370 (8th Cir.1983), this court offered the following explanation of the antitrust injury requirement: "it is insufficient for plaintiffs to simply assert that plaintiffs' damages would not have been incurred without [the alleged anticompetitive conduct]." *Id.* at 1374. Rather, the plaintiff must establish that "there was *** proximate causation between plaintiff's harm and the alleged illegal market restraint." *Id.* Unless it can establish that its alleged injury was caused by conduct that violates the antitrust laws, a plaintiff lacks standing, under Section 4 of the Clayton Act, to bring

an antitrust lawsuit.[7] The threshold requirement of an antitrust injury reflects the Supreme Court's frequently stated maxim that Congress enacted the antitrust laws to protect competition, not competitors. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 488, 97 S.Ct. at 697 (1977) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962)).

[1] Our review of the record convinces us that Fischer failed to prove that it has suffered an antitrust injury. Fischer does not contend that it was a customer of

---

[7]Section 4 states that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ***."

We note the Second Circuit's recent observation that the United States Supreme Court has indicated that although a showing of antitrust injury is required from plaintiffs in both injunction and damages cases, "standing analysis under § 16 will not always be identical to standing analysis under § 4." *See Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 259 n. 6 (2d Cir.1989) (Quoting *Cargill v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 n. 6, 107 S.Ct. 484, 490 n. 6, 93 L.Ed.2d 427 (1986)).

The court in *Gold Fields* explains that:

> Since section 4 allows for treble-damage recovery, courts will generally be more circumspect about granting relief: "In order to protect against multiple lawsuits and duplicative recoveries, courts should examine other factors in addition to antitrust injury, such as the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff under § 4."

Id.; *see also Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519, 544-45, 103 S.Ct. 897, 911-12, 74 L.Ed.2d 723 (1983).

In other words, the court in *Gold Fields* observes, "*Cargill* supports the proposition that standing analysis under section 16 is *** less rigorous than that under section 4." *Consolidated Gold Fields*, 871 F.2d at 259 n. 6. We need not apply the extra-rigorous *Cargill* standing analysis to Fischer's antitrust claims since Fischer has failed to cross the initial threshold of proving that it suffered an antitrust injury. However, we note that even if it had done so, Fischer would still have had further obstacles to pass before it could establish that is was entitled to damages under section 4.

Northwest forced to pay increased prices. Nor was Fischer a competitor injured by Northwest's acquisition of monopoly power (roughly 75% of the Detroit market). Rather, Fischer asserts that it suffered damage when it was terminated as Northwest's exclusive regional carrier in Detroit. We conclude that Fischer's termination was not caused by anticompetitive conduct or an anticompetitive effect of such conduct; rather, it was caused by Northwest's need to avoid employing two regional airlines where only one was required. We are convinced that even in a city in which Northwest had far less than monopoly power, it would have been reluctant to waste resources on overlapping contractual agreements providing twice the regional connecting flight service required.

Furthermore, it is not disputed that the original Northwest/Fischer agreement, *see supra* p. 597, gave both sides power to terminate the agreement at will with six months notice. Northwest did not act in an anticompetitive manner when it chose to exercise that termination power. Indeed, Northwest's termination power was in no way enhanced by the acquisition of Republic or any anticompetitive effects it may have engendered. Therefore, we hold that because Fischer suffered no antitrust injury, it lacked standing as an antitrust plaintiff under Section 4 of the Clayton Act. Hence, the district court did not err in granting summary judgment for Northwest on all of Fischer's antitrust claims.

IV.

Finally, we move to Fischer's common-law claims.[*] Northwest gave Fischer six months notice of termination on September 24, 1986. Therefore, Fischer apparently was entitled to retain its status as Northwest's exclusive regional airlink in Detroit until the termination date: March 24, 1987. However, Simmons began to provide connecting service as a Northwest airlink on October 1, 1986. Fischer's objections to Northwest's and Simmons' apparent violation of Fischer's contractual right to remain Northwest's exclusive regional airlink in Detroit through the entire termination notice period gave rise to Fischer's common-law claims in the district court. The court dismissed three of Fischer's common-law claims (fraud, tortious interference with contract, and tortious interference with prospective advantage) on substantive grounds. The court also dismissed all of the common-law claims on the grounds that they were time-barred by the arbitration clause in the 1985 agreement between Fischer and Northwest.

[2] Fischer never sought arbitration of its grievances against Northwest and Simmons. It ignored the

[*]We note that two of Fischer's common-law claims cite Simmons as a defendant or co-defendant. Therefore, they are arguably not covered by the mandatory arbitration clause in the 1985 Northwest/Fischer agreement. We take no position on that question, as Fischer has briefed and argued the five common-law claims as though they were either all covered by the clause or not covered at all. During oral argument, counsel for Fischer stated that the common-law claims against Simmons "rise and fall depending on whether there is concerted action" found between Northwest and Simmons. In addition, Argument III in Fischer's brief reads, "The Trial Court Erred in Holding That the Arbitration Clause of the Fischer Bros.-Northwest Agreement Barred *All* Common Law Claims" (emphasis added). Appellant's brief at i. In the district court, Judge Alsop dismissed substantive grounds, concluding that both claims were predicated on an alleged agreement between Northwest and Simmons to terminate Fischer and the Fischer "simply failed to create a factual issue regarding the existence of an agreement to terminate [Fischer]." *Fischer v. NWA*, slip op. at 21.

arbitration clause, choosing instead to file the instant lawsuit.[9] Nevertheless, Fischer contends on appeal that despite its failure to seek arbitration, the district court was incorrect to conclude that its common-law claims are barred by the mandatory arbitration clause. We disagree and affirm the district court's holding concerning Fischer's common-law claims.

The disputed arbitration clause provided that:

> Any dispute, controversy or claim between the Parties, as to which there are no other necessary or indispensable parties, arising out of or relating to this Agreement, including its breach, or the transactions contemplated by this Agreement, which cannot be resolved amicably by the Parties, *shall* be referred to arbitration within 120 days of the date the alleged breach occurred. [Emphasis added].

Fischer concedes that the arbitration clause is mandatory. It also concedes that the clause is not too narrow in scope to encompass its claims against Northwest and Simmons. Instead of challenging the validity or scope of the clause, Fischer submits three arguments suggesting that the clause is inapplicable to its common-law claims because of factual circumstances surrounding its dealings with Northwest and Simmons. First, Fischer argues that by continuing to negotiate with Fischer for more than 120 days after its breach of the 1985 agreement, Northwest enticed Fischer into forfeiting its ability to act under the mandatory arbitration clause. In essence, Fischer argues that compliance with the terms of the arbitration clause became *impossible* because of Northwest's actions. We find this argument meritless. After the alleged breach of contract, Northwest continued to negotiate toward a

---

[9]It is clear that Fischer chose quite early in the development of its claims to ignore the arbitration clause. On October 14, 1986, well within any measurement of the 120-day time period, Fischer, instead of seeking arbitration, sent a notice of default to Northwest. The notice alleged that Northwest had breached the 1985 agreement and threatened Northwest with legal action.

new agreement with Fischer, not to salvage the 1985 agreement. Northwest had no power to prevent Fischer from seeking arbitration to settle the dispute over the alleged breach of the original agreement. Further, it strikes us as disingenuous for Fischer, after maneuvering as though it were not bound by a mandatory arbitration clause (Fischer has never sought arbitration of its grievances under the 1985 agreement), to rely on a *post hoc* argument that the appellees prevented it from seeking arbitration.

Fischer also argues that the arbitration clause is inapplicable because Simmons was a necessary or indispensable party. Again, we disagree. In *Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc.*, 564 F.2d 816, 820 (8th Cir.1977), the Eighth Circuit held that "a person does not become indispensable to an action to determine rights under a contract simply because that person's rights or obligations under an entirely separate contract will be affected by the result of the action." We agree with the district court that the reasoning in *Helzberg* directly applies to this case. The contract at issue involves only Northwest and Fischer, not Simmons.

Third, Fischer contends that because of its conduct, Northwest waived its right to enforce the arbitration clause. However, since Northwest is not the aggrieved party in this case, it had no duty to enforce the mandatory arbitraton clause. The clause plainly states that "[a]ny dispute, controversy or claim between the parties *** arising out of or relating to this Agreement, including its breach, *** shall be referred to arbitration within 120 days of the date the alleged breach occurred." Fischer believed that a breach had occurred, yet it failed to seek arbitration, opting instead to litigate its claims. The arbitration clause in the 1985 Northwest/Fischer agreement clearly makes arbitration the sole dispute resolution mechanism agreed upon by the parties. Since Fischer failed to seek arbitration at any time, we affirm the district court's holding that Fischer's common-law claims are time-barred.

For all the foregoing reasons, we affirm the district court's summary judgment order.

LARSON, Senior District Judge, concurring and dissenting.

I agree with the majority that plaintiff's common law claims against defendant Northwest for fraud, breach of contract, and breach of the implied covenant of good faith and fair dealing are barred by the mandatory arbitration clause in the contract between plaintiff and Northwest. I respectfully dissent from the majority's decision affirming the dismissal of plaintiff's antitrust claims and its common law claims against Simmons.

In 1985, defendant Northwest and Republic Airlines were competing national airlines operating "hubs" at the Detroit and Minneapolis/St. Paul airports.[1] Defendant Simmons was a regional air carrier providing service from Detroit and Chicago, and had just begun serving as a Republic Express commuter carrier out of Detroit.[2] Plaintiff Fischer Bros. was a regional air carrier probiding service to various cities in Ohio and Michigan and operating as a regional airline of US Air.

On December 23, 1985, Fischer Bros. discontinued its affiliation with US Air and entered into a five year agreement to provide commuter service for Northwest. As a Northwest Airlink, Fischer Bros. was in competition with Simmons, operating as Republic Express, in markets from Detroit to Traverse City, Lansing, and Flint, Michigan, and from Detroit to Cleveland and Columbus, Ohio. In January, 1986,

---

[1]Airlines operating on a nationwide basis have developed "hubs," populous cities at which substantial numbers of an airline's flights converge and offer connecting opportunities.

[2]Commuter carriers generally serve smaller communities with smaller aircraft. Commuter carriers which affiliate with a major carrier are able to use the major carrier's logo and have access to the major carrier's designator code shown in computerized reservation systems.

Northwest and Republic executed an agreement and plan of merger, subject to approval by the Department of Transportation (DOT). Northwest informed the commuter carriers, including Fischer Bros., that they would continue to "play a major role" and would have expanded opportunities as Northwest commuter carriers after the merger.

No airline opposed the merger in administrative hearings before the DOT,[3] but the Antitrust Division of the United States Department of Justice did. In response to the Department of Justice's opposition, Northwest argued the merger would not reduce competition because, *inter alia*, the remaining airlines, including commuter carriers such as Fischer Bros., would continue to compete against the merged Northwest-Republic. The DOT concluded the proposed merger presented "some troubling issues." The Department nonetheless approved the merger on August 12, 1986, but declined to grant any antitrust immunity to the merged company.

After the merger was approved, Northwest presented to the commuter carriers a proposal for dividing up the markets in Detroit and Minneapolis/St. Paul. Both Fischer Bros. and Simmons rejected the proposal for the Detroit regional market.[4] In the ensuing weeks, Fischer Bros. made several counterproposals to Northwest, including one which contemplated continued competition, but these proposals were rejected by Simmons and/or Northwest. On September 8, George Rassmusson, who had been Republic's Director of Regional Airline Programs and who was employed after the merger by Northwest in that capacity, became involved in the negotiations. Rassmusson had worked closely with Joel Murray, Simmons' chairperson, during

[3]The President of Simmons candidly admitted that Northwest's representations "were a factor" in his thinking concerning whether to oppose the merger before the DOT.

[4]The two carriers serving the Minneapolis/St. Paul regional market eventually reached agreement on a division of that market.

Rassmusson's employment at Republic and was a "drinking buddy" of Peter Piper, Simmons' Executive Vice President.

On September 11, Rassmusson met with representatives of Fischer Bros. and Simmons. After several hours of discussion, Simmons offered to purchase Fischer Bros. for $3.3 million. When the parties met to consummate the sale on September 22, however, Fischer Bros. claims Simmons changed its position and added new and unacceptable terms to the deal. Negotiations continued throughout the day with Rassmusson's participation. That evening, Rassmusson had dinner with Piper and Murray from Simmons. The following day, negotiations remained stalled. Rassmusson left, and Fischer Bros., after discussing the matter further, decided to return to Ohio to consider Simmons' proposals.

The next day, September 24, 1986, Fischer Bros. received a notice from Simmons withdrawing all offers and, within hours, also received a notice of termination from Northwest. Fischer Bros. claims its termination resulted from an agreement between Simmons and Northwest to eliminate Fischer Bros. from the market because Fischer Bros. would not agree to Simmons' terms for purchase or to Simmons' and Northwest's terms for dividing up the Detroit market.

In concluding the termination "was caused by Northwest's need to avoid employing two regional airlines where only one was required," rather than any anticompetitive conduct, *see* at 600, the majority fails to consider all of the evidence in the record. Northwest's own witnesses were unable to testify consistently concerning why Fischer Bros.' contract was cancelled within hours of Simmons' withdrawal of all offers. Nor did they consistently testify as to what Northwest knew at the time it terminated Fischer Bros.

Rassmusson first testified that he met with his superior, Executive Vice President of Marketing A.B. Magary, on September 24, recommended termination of

Fischer Bros., and received approval from Magary, who "said that he would handle the logistics of the notification." After Magary testified that he was out of the country from September 19 until the evening of September 25, that he did not participate in the decision to cancel Fischer Bros., and that the "decision on how to handle the contracts was really pretty much left to the lawyers. The lawyer in this case being Terry Hall," Rassmusson changed his deposition testimony to say that he met on the 24th with attorney Hall and recommended termination to Hall, who approved and accepted the recommendation. Hall, however, denied that he participated in the decision to terminate Fischer Bros., and testified that his only involvement was drafting the termination notice at Rassmusson's request.

Hall also testified that when he drafted the termination notice he knew that Simmons had been negotiating with Fischer Bros., that the negotiations had broken down, and that Simmons had withdrawn its offers to purchase Fischer Bros. This knowledge could only have come from Simmons. On reading and signing his deposition, however, Hall changed his testimony to reflect only that he was aware that negotiations had "broken down," consistent with Rassmusson's testimony that it was through Fischer Bros., not Simmons, that he learned of the result of the September 23 meeting. Fischer Bros.' representatives deny having contact with Rassmusson between the time the meeting ended on the 23rd and the time they received the termination notice on the 24th, however.

These inconsistencies, coupled with the timing of the notices from Simmons and Northwest and Northwest's admitted knowledge of the status of the negotiations between Simmons and Fischer Bros., in my view create a factual dispute concerning whether Simmons and Northwest agreed to eliminate Fischer Bros. from the

Detroit regional market.[7] Fischer Bros. ceased operation when Northwest's termination became effective on March 25, 1987. Its assets were sold to Midway Airlines in May, 1987, and it no longer competes in the Detroit regional market. Since March, 1985, each of the routes on which Fischer Bros. competed with Simmons is a monopoly for Northwest and/or Simmons, with the exception of Detroit-Cleveland, and service on all routes has been reduced.

Contrary to the majority, I believe these facts constitute sufficient evidence of "antitrust injury" to withstand a motion for summary judgment both with respect to plaintiff's challenge to the Northwest-Republic merger and with respect to plaintiff's claims of a conspiracy between Northwest and Simmons to restrain trade and to monopolize the Detroit regional market. I agree that in order to maintain a treble damage action under section 4 of the Clayton Act, a plaintiff must establish an injury "of the type the antitrust laws were intended to prevent ... that flows from that which makes defendants' act unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977); *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir.), *modified on other grounds*, 722 F.2d 1370, 1388 (8th Cir.1983), *cert. denied*,

---

[7]To withstand a motion for summary judgment, plaintiff must show "the inference of conspiracy is reasonable in light of the competing inference of independent action." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1985). Plaintiff's evidence does precisely that. *Cf. In re Workers' Compensation Insurance Antitrust Litigation*, 867 F.2d 1552, 1560-61 (8th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 3247, 106 L.Ed.2d 593 (1989) (finding sufficient evidence to create a genuine issue of fact as to whether defendants entered into an agreement to boycott, coerce, or intimidate insurers to agree to uniform rate for worker's compensation insurance); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252-56 (2d Cir.), *cert. denied*, 484 U.S. 977, 108 S.Ct. 489, 98 L.Ed.2d 487 (1987) (finding sufficient evidence of conspiracy based upon parallel behavior and evidence of telephone conversation between two defendants).

469 U.S. 870, 105 S.Ct. 219, 83 L.Ed.2d 149 (1984). *See generally* P. Areeda & H. Hovenkamp, *Antitrust Law*, para. 334.2a (Supp.1988). I also agree that to be successful, an antitrust plaintiff seeking damages must establish not only harm sufficient to satisfy the constitutional standing requirement of injury in fact, but must also establish it is a proper party to bring the action based upon an evaluation of the plaintiff's harm, the alleged wrongdoing by the defendant, and the relationship between them. *Associated General Contractors v. Carpenters*, 459 U.S. 519, 535 & n. 31, 103 S.Ct. 897, 907 & n. 31, 74 L.Ed.2d 723 (1983); *South Dakota v. Kansas City Southern Industries, Inc.*, 880 F.2d 40, 45-46 (8th Cir.1989); *McDonald*, 722 F.2d at 1373-74.

At this stage of the proceedings, however, plaintiff is entitled to all reasonable inferences from the evidence presented and need only establish a genuine issue of material fact with regard to the existence of antitrust injury. *See R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 107-11 (2d Cir.1989); *In re Worker's Compensation Insurance Antitrust Litigation*, 867 F.2d at 1560. Examination of each of plaintiff's claims reveals sufficient evidence of injury in my view to defeat defendant's motion for summary judgment.

Assuming Fischer Bros. can prove its allegations of a conspiracy between Northwest and Simmons to eliminate Fischer Bros. as a competitor in the Detroit regional market, the injury to Fischer Bros. is direct, is accompanied by an improper motive, and is clearly the type of injury to competition which the antitrust laws were intended to prevent. Indeed, neither defendant even advanced the argument that lack of injury precluded plaintiff's conspiracy claims.

Defendant Northwest did advance the argument that Fischer Bros. lacked standing to challenge the Northwest-Republic merger, alleging Fischer Bros. had suffered only indirect injury as a result of the merger. Fischer Bros. contends it was harmed by the merger as a

competitor at the Detroit "hub," because the merger gave Northwest sufficient market power at Detroit (75% of enplanements) to force Fischer Bros. from the market and to prevent its reentry. Fischer Bros. presented evidence that affiliation with a major carrier is essential to the survival of a commuter carrier, and that after the merger Northwest was essentially the only major carrier with a presence at Detroit.

In its application to the Department of Transportation in support of the merger, Northwest stated that it competed with commuter carriers such as Fischer Bros. in many domestic city pairs and argued that the merger would not foreclose compection because of the presence of these smaller carriers.[6] While a competitor may not challenge a horizontal merger on the ground that the merged entity will be better able to compete against it or on the theory that *it* should be entitled to monopoly profits rather than the alleged monopolist, a competitor does have standing to challenge a merger which will result in monopoly power where there is also an allegation of post-merger predatory conduct such as predatory pricing or other predatory non-price strategies. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 120-22, 107 S.Ct. 484, 495, 93 L.Ed.2d 427 (1986); P. Areeda & H. Hovenkamp, *Antitrust Law*, para. 340.2 at 360-68 (Supp.1988).

In *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir.1989), for example, the Second Circuit found a competitor had standing to challenge the merger of two herbal tea companies on the theory that the merged company, which would enjoy an 84% market share, would be likely to eliminate competition in the herbal tea market by, *inter alia*, reducing the plaintiff

[6]Northwest argued before the DOT that commuter carriers can compete effectively even without affiliation with a major carrier or through affiliation with a major carrier at cities where the major carrier does not operate a hub. Northwest further argued that there are no barriers to the creation of a hub at Detroit by a competing major airline. These, of course, are questions of fact which cannot be resolved on a motion for summary judgment.

competitor's access to supermarket shelf space. *Id.* at 111. In *Bigelow*, the court even accorded plaintiff a *presumption*, in response to defendant's motion for summary judgment, that such anticompetitive conduct would occur. *Id.*

No presumption of post-merger predatory conduct is needed in this case, because Fischer Bros. alleges Northwest actually used its post-merger monopoly power to eliminate Fischer Bros. as a competitor in the Detroit regional market. The elimination of a competitor through predatory acts is "antitrust injury." *Cf. Consolidated Gold Fields v. Minorco*, 871 F.2d 252, 257-58 (2d Cir.1989)(finding sufficient injury to challenge takeover where plaintiff company alleged acquiring company would limit its production; reduction in competition was "precisely the type [of injury] the antitrust laws were designed to protect against").

The majority cites Northwest's ability to terminate Fischer Bros. on six months' notice, arguing Northwest would have terminated Fischer Bros. regardless of its post-merger market share because it was faced with two overlapping commuter services. But Northwest's monopoly power is precisely, according to plaintiff, why Northwest was able successfully to eliminate *competition* when it conspired with Simmons to eliminate Fischer Bros. as a competitor. Fischer Bros.' termination, in this case, constitutes "antitrust injury" because plaintiff has presented sufficient evidence to raise an inference that Northwest did not simply terminate Fischer Bros.; it used its market power in combination with another competitor to reduce competiton at the Detroit hub. *Cf. South Dakota v. Kansas City Southern Industries, Inc.*, 880 F.2d 40, 46, 49 (8th Cir.1989)(denying standing to State of South Dakota, which was neither competitor nor consumer of defendant's, stating "[w]ithout a doubt" that competitor had standing to raise antitrust claims).

While the majority also alludes to additional "extra-rigorous" factors relevant to a determination of the standing of a treble damage plaintiff, *see* note 7 *supra*

at 599; *see generally Associated General Contractors*, 459 U.S. at 537-45, 103 S.Ct. at 908-12, Northwest did not rely on any of these other criteria to support the district court's judgment. Rather, Northwest argued only that Fischer Bros.' alleged injury was too "indirect." I agree with the district court's observation that this allegation alone, in the context of this case, does not provide a sound basis for granting summary judgment.

The district court also concluded, however, that Fischer Bros. was precluded from challenging the merger because of the judicial review provisions contained in section 1006(d) of the Federal Aviation Act. Northwest argues on appeal that the exclusive means of challenging the merger as a violation of the antitrust laws is through an appeal of the DOT's order approving the merger. *See* 49 U.S.C.App. § 1486.[7]

Northwest's argument, based upon *City of Tacoma v. Taxpayers*, 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958), fails, however, to consider the effect of the DOT's refusal to exempt the merger from the antitrust laws pursuant to section 414 of the Act. *See* 49 U.S.C.App. § 1384. Under section 1384, the DOT, as part of its order approving transactions such as the Northwest-Republic merger,

> *may* ... exempt any person affected by such

---

[7] Section 1486 provides, in relevant part:

> (a) Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this chapter ... shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order....
>
> * * * * * *
>
> (d) Upon transmittal of the petition to the Board or Secretary of Transportation, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Secretary of Transportation....

49 U.S.C.App. § 1486.

> order from the operations of the "antitrust laws" ... to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest.

49 U.S.C.App. § 1384 (emphasis added).

Section 1384 was enacted in 1978 along with amendments to the Federal Aviation Act which substantially deregulated the airline industry. *See generally* S.Rep. No. 95-631, 95th Cong. 2d Sess. 1 (1978). Prior to amendment in 1978, antitrust immunity was automatically conferred on any person affected by an order of the Civil Aeronautics Board (CAB), which had previously had jurisdiction to approve airline mergers, acquisitions, and other agreements.[*] The Supreme Court had liberally construed this grant of immunity in *Hughes Tool Co. v. TWA, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), to extend farther than the

---

[*]The CAB's antitrust and consumer functions were transferred to the DOT as of January 1, 1985. *See* Civil Aeronautics Board Sunset Act of 1984, Pub.L. No. 98-443, 98 Stat. 1703 (1984). The CAB had operated for many years under the automatic immunity provisions of section 1384 which, prior to amendment in 1978, had provided:

> Any person affected by any order under [the Federal Aviation Act] shall be, and is hereby, relieved from the operation of the "antitrust laws" ... and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

CAB itself desired.[9]

As a result of this decision, the CAB suggested in hearings on the 1978 legislation amending the Federal Aviation Act that it be given the power to limit the scope of the immunity conferred. *See* S.Rep. No. 95-631, 95th Cong. 2d Sess. 84-85 (1978). *See generally* H.Rep. No. 95-1211, 95th Cong. 2d Sess. 18 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin.News 3737, 3754. The Senate bill granted the CAB this power and also limited the immunity conferred to that "necessary to enable such person to engage in the air transportation activities specifically approved by the Board." *See* S.Rep. No. 95-631, 95th Cong. 2d Sess. 24 (1978)(text of proposed immunity section).

While the Senate version continued the automatic immunity concept, these amendments were designed to allow the Board "to approve transactions for transportation purposes, but still refrain from conferring antitrust immunity *on any or all* aspects of the transaction." *Id.* at 85 (emphasis added). In discussing the ability of the courts to entertain antitrust challenges to activities which the CAB had previously considered, sponsors of the legislation agreed that

> the Board could, if it chose, approve of activities that it would not immunize. That is, that in the proper case, the Board might allow a merger or agreement to go forward but still decide to withhold antitrust immunity alto-

[9]The Court overturned an award of more than $145 million to TWA, which the airline alleged had resulted from its control by Hughes Tool Co. (Toolco). In its lawsuit, TWA alleged Toolco had required TWA to purchase or lease airplanes from Toolco alone. The CAB had approved Toolco's control over TWA in orders issued in 1944, 1948, 1950, and 1960, and had approved each acquisition or lease of aircraft by TWA from Toolco. 409 U.S. at 369, 379, 93 S.Ct. at 652, 657. The CAB argued before the Court that it had approved the arrangements only on the basis of a lack of showing of anticompetitive effects in the airline industry, not in the aircraft manufacturing industry, but the Supreme Court ruled the CAB had the authority to consider all aspects of a transaction and found Toolco immune from suit. *Id.* at 389, 93 S.Ct. at 661.

> gether.... [T]his is important because it will take a lot of responsibility for policing competitive fair play off the Board and put it back on the airline. The Board will not have to always choose between disapproval and antitrust immunity, and the parties will know that they cannot misbehave after initial approval and expect to use a Federal law as a shield against antitrust liability.

124 Cong.Rec. 10687 (April 18, 1978) (remarks of Sen Kennedy).

The House version restricted grants of immunity even further by *not* automatically conferring such immunity on approved transactions. *See* H.Rep. No. 95-1211, 95th Cong. 2d Sess. 18 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin.News at 3754. Instead, the House bill conditioned any grant of immunity on the affirmative finding by the Board that such immunity was in the public interest. *See id.* Opponents of the House version argued the "removal of the automatic exemption from the antitrust laws ... once the Board has given approval to an air carrier agreement as in the public interest is unfortunate and creates ambiguity," Minority Views of Rep. Stump, *id.* at 72, *reprinted in* 1978 U.S. Code Cong. & Admin.News at 3767, but the Conference Committee nonetheless adopted the House version. *See* House Conf.Rep. No. 95-1779, 95th Cong.2d Sess. 78 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin.News 3773, 3792.

Northwest contends these amendments to the Act's immunity provisions are irrelevant to consideration of whether section 1486 of the Act establishes the exclusive means for challenging the merger on antitrust grounds. *See* 49 U.S.C.App. § 1486. Northwest further contends that if the merger had been immunized, *all* of plaintiff's antitrust claims would be barred. But this argument ignores Congress' express intent to grant the DOT authority to limit the immunity granted to all, some, or none of the transaction it approves. *See* 49 U.S.C.App.

§ 1384.[10]

In my view,the judicial review provisions of the Federal Aviation Act should not be interpreted to preclude independent judicial action to enforce the antitrust laws where, as here, the agency has specifically declined to grant antitrust immunity to the approved transaction.[11] The doctrine of exclusive jurisdiction is to be invoked only when a court finds that it has been totally ousted of jurisdiction because Congress, in enacting the regulatory statute, "intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374, 93 S.Ct. 1022, 1028, 35 L.Ed.2d 359 (1973). *See generally* 16E Business Organizations, Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 44A.01[2] (1989).

While the statutory scheme concerning DOT's approval of mergers is comprehensive, allowing an independent antitrust challenge to non-immunized airline mergers is consistent with Congress' intent, in the era of

[10]Scholars agree that the task of resolving "those difficult situations in which antitrust enforcement appears to be coextensive with administrative regulation" is not an easy one. *See* 16E Business Organizations, Von Kalinowski, *Antitrust Laws and Trade Regulations* § 44.A01[1] at 44A-2 (1989). Whether phrased in terms of immunity or exclusive jurisdiction, the issue in this case is whether Congress intended to leave judgments about whether mergers violate the antitrust laws entirely to the agency (with review in the court of appeals), *even* when the agency declines to exempt the merger from the operation of the antitrust laws. *See Id.* at §§ 44.01, 44A.05 (discussing exclusive jurisdiction under the rubric of exemptions and immunities to the antitrust laws). *See also* K. Davis, *Administrative Law Treatise* § 22.9 at 116 (2d ed. 1983); P. Areeda & D. Turner, *Antitrust Law*, para. 223h (1978).

[11]"Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored," and have only been found "in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51, 83 S.Ct. 1715, 1734-35, 10 L.Ed.2d 915 (1963).

deregulation, to "take a lot of responsibility for policing competitive fair play off the [agency]," 124 Cong.Rec. 10687 (remarks of Sen. Kennedy), and to subject the airlines' activities to the same antitrust standards applicable to unregulated industries. *See* H.Conf.Rep. No. 95-1779, 95th Cong. 2d Sess. 72-73 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin.News 3773, 3788-89. *See generally* P. Areeda & H. Hovenkamp, *Antitrust Law* para. 223.2 (Supp.1988).[12]

Where immunity is granted, I agree that the court of appeals has exclusive jurisdiction to review the challenged action. But where immunity is neither requested by the carrier nor granted by the agency, district courts should be free to entertain antitrust challenges such as the plaintiff has presented in this case. In sum, I believe plaintiff is entitled to challenge the Northwest-Republic merger under Sections 1 and 2 of the Sherman Act and is entitled to a trial on its claims relating to an alleged agreement between Northwest and Simmons to eliminate plaintiff from the Detroit regional market. While I agree with the majority that plaintiff's state law claims against Northwest were properly dismissed by the district court, I would reverse the district court's grant of summary judgment on plaintiff's antitrust claims and on its state law claims

---

[12]It is also more consistent with actual enforcement of the antitrust laws, given Congress' view of the agency's record in this regard. As the Senate Report noted, the CAB tended to "identify its own success with the profitability of individual carriers" and had also tended to regard mergers as "a tool for insuring the financial well-being" of economically ailing air carriers. S.Rep.No. 95-631, 95th Cong.2d Sess. 4, 79 (1978).

against defendant Simmons alone,[14] and accordingly, I dissent.

[14] The district court dismissed plaintiff's state law claims against Simmons for lack of sufficient evidence of an agreement between Simmons and Northwest. Because I find sufficient evidence of such an agreement to withstand a motion for summary judgment, I would reverse this dismissal, notwithstanding Simmons' argument on appeal that plaintiff has abandoned its state law claims against Simmons. Plaintiff clearly has argued the sufficiency of the evidence to sustain its claim of an agreement between Simmons and Northwest, and its state law claims "rise or fall" on the basis of this issue. *See* n. 8 *supra* at 600.

APPENDIX B

United States District Court
District of Minnesota
Third Division

3-87 CIV 106

WILLIAM R. FISCHER,
The Estate Of BETTY L. FISCHER,
MONTFORD R. FISCHER and BONITA G. FISCHER,
Plaintiffs,

v.

NWA, INC.; NORTHWEST AIRLINES, INC.;
and SIMMONS AIRLINES, INC.,
Defendants.

ORDER

Gray, Plant, Mooty, Mooty & Bennett, P.A., by DANIEL R. SHULMAN of Minneapolis, Minnesota, and Alioto & Alioto by JOSEPH M. ALIOTO of San Francisco, California, appeared on behalf of plaintiffs.

Zuckert, Scoutt, Rasenberger & Johnson by FRANK J. COSTELLO and JAYME I. RIZZOLO of Washington, D.C., and Corporate Counsel for Northwest Airlines, Inc., by PAUL L. DINGER of Eagan, Minnesota, appeared on behalf of defendants NWA, Inc., and Northwest Airlines, Inc.

Winston and Strawn by DAN K. WEBB and ROBERT G. FOSTER of Chicago, Illinois, and Robins, Zelle, Larson & Kaplan by ELLIOT S. KAPLAN of Minneapolis, Minnesota, appeared on behalf of defendant Simmons Airlines, Inc.

The above entitled matter came on for hearing on April 14, 1988, upon the motions of defendants NWA, Inc., and Northwest Airlines, Inc. (hereinafter referred to collectively as NW), and defendant Simmons Airlines, Inc. ("Simmons") for summary judgment.

I. BACKGROUND

On December 23, 1985, Plaintiffs[1] entered into a regional airline service agreement with NW. Pursuant to the agreement, FBA would provide regional air service at Detroit for NW as a NW Airlink beginning in February 1986. The agreement further provided that FBA would be the exclusive regional airline for NW at Detroit unless FBA chose not to service a particular route. Either party could terminate the agreement without cause upon six months' notice. In addition, the agreement contained a mandatory arbitration clause.

Prior to the execution of the regional airline agreement with FBA, NW had been exploring the possible acquisition of Republic Airlines, Inc. ("Republic"). There were several meetings in December 1985 between NW and Republic executives regarding possible acquisition. There is no evidence in the record, however, that NW

---

[1] Remaining plaintiffs are former owners of Fischer Brothers Aviation, Inc. See the court's order dated October 20, 1987. Plaintiffs will be hereinafter referred to collectively as FBA.

and Republic had reached even a tentative agreement concerning the acquisition prior to December 23, 1985. On January 23, 1986, NW and Republic publicly announced their agreement to a proposed acquisition of Republic by NW subject to approval by the Department of Transportation ("DOT").

The proposed acquisition, if approved, created a dilemma for NW regarding regional airline service at Detroit. This is so because Republic had a regional airline agreement with Simmons at Detroit. The agreement was executed on December 26, 1984, and could not be terminated by either party until October 29, 1988. Similar to the NW agreement with FBA, the Republic/Simmons agreement granted Simmons the right to be the exclusive regional airline for Republic at Detroit unless Simmons chose not to service a particular route.[2]

Between the public announcement of the proposed acquisition and the DOT approval which occurred on August 12, 1986, NW did not make any expressed commitments to the NW/Republic regional airlines, although it indicated to both FBA and Simmons that if the acquisition was approved, NW was hopeful that there would be a role for all regional airlines. Following DOT approval of the acquisition, both Simmons and FBA notified NW in writing that they intended to enforce the exclusive rights provision contained in their respective contracts. Shortly thereafter NW requested that the four regional airlines at Detroit and Minneapolis/St. Paul attend a meeting on August 19, 1986, in Minneapolis, to discuss the status of NW/Republic regional airlines.

At the August 19 meeting Mr. Magary of NW informed the representatives of the regional airlines that NW wanted the carriers to mutually agree on the division of routes at Detroit and Minneapolis/St. Paul.

---

[2] NW was confronted with essentially the same problem at Minneapolis/St. Paul. NW had a pre-existing contract with Mesaba while Republic had a pre-existing contract with Express.

Mr. Magary further stated that NW did not want to be directly involved in the negotiations between the two sets of airlines but would do what it could indirectly to facilitate the division. Magary said that NW would not get involved in secret proposals and private discussions with individual airlines.

During the meeting NW distributed a proposed route division for the Detroit and Minneapolis/St. Paul markets. Simmons, FBA and Mesaba verbally objected to the proposal at the meeting. Later in the month of August Mesaba and Express mutually agreed to a division of the routes at Minneapolis/St. Paul.

Immediately after the meeting, Mr. Murray and Mr. Piper, representatives of Simmons, met privately with Magary and Mr. Abbott, another representative of NW. According to participants' recollections, first Murray indicated that Simmons expected to be compensated for any routes it gave up to FBA. After Magary rejected any such payment, Murray then asked Abbott if NW would have any objection to Simmons attempting to acquire FBA, to which Abbott had no objection.

Between the August 19 meeting and when NW sent FBA notice of termination on September 24, 1986, there were numerous meetings, telephone conversations and written correspondences between FBA, Simmons and/or NW. The interactions proceeded along two lines, sometimes simultaneously, one concerning dividing the routes at Detroit and the other involving the sale of FBA to Simmons. Instead of reciting every alleged interaction between FBA, Simmons and/or NW and each party's sometimes diverging interpretation of what took place during the interactions, or indeed whether the interaction occurred at all, the court will address with specificity in the discussion portion of this order the factual issues that, according to the plaintiffs, preclude summary judgment on the plaintiffs' various legal claims.

Ultimately, FBA and Simmons did not mutually agree on either the division of routes or the sale of FBA to

Simmons. Following a September 22-23, 1986, meeting held in Chicago and attended by representatives of Simmons and FBA[3], NW sent a written notice of termination to FBA on September 24 and Simmons revoked its offer to purchase FBA for approximately 3.3 million dollars on the same day.

Following the notice of termination, NW informed FBA that although NW was still interested in reaching an Airlink agreement with FBA, Simmons would have the right of first refusal on any routes at Detroit. Consequently, NW determined which Detroit routes Simmons did not want to service, and offered those routes to FBA. The other significant item of negotiation was the pro-rate formula for dividing fares between NW and Simmons.

The negotiations continued over several months but ultimately NW and FBA did not enter into a new regional airline service agreement, and on February 4, 1987, NW discontinued the negotiations when it saw no hope in resolving their differences and it learned that FBA had retained an attorney to sue NW. FBA terminated its operations as a regional airline for NW on March 24, 1987, six months following the notice of termination. On May 26, 1987, FBA was sold to Midway Airline for 2.235 million dollars.

II. DISCUSSION

Plaintiffs assert nine different statutory or common law claims against one or both defendants. Because defendants' motions for summary judgment raise issues unique to many of the claims, each claim will be discussed separately.

Although the textual standard for granting summary

[3]Mr. Rasmusson, a representative of NW, also attended portions of this meeting.

judgment has remained unchanged for many years,[4] two recent Supreme Court cases interpreting Rule 56 have refined its application. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986), the Supreme Court equated the standard for granting summary judgment to the standard for granting a directed verdict, noting that the difference is primarily the time when the respective motions are made. *Id.* at 2513. Consequently, a genuine issue of material fact does not exist if it would be unreasonable for a jury, construing the evidence in a light most favorable to the non-moving party, to find for the non-moving party on the disputed factual issue.

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), the Supreme Court indicated that a non-moving party in a summary judgment motion has an affirmative obligation to make a showing sufficient to establish the existence of each essential element to that party's case on which that party will bear the burden of proof at trial, if the existence of that element is brought into issue by the moving party. *Id.* at 2548. In neither of these cases did the Supreme Court modify the longstanding requirement that the district court give the non-moving party the benefit of all reasonable inferences that can be drawn from the underlying facts. *See Trnka v. Elanco Products Co.*, 709 F.2d 1223, 1225 (8th Cir. 1983).

A. Antitrust Claims.

Plaintiffs, in essence, assert four separate antitrust claims. They claim the acquisition of Republic by NW constitutes an unlawful contract or combination that restrains trade in violation of Section 1 of the Sherman Act and attempts to or does create a monopoly in

[4]Under Fed. R. Civ. P. 56(c), the district court should grant summary judgment only "if the pleadings, depositions and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

violation of Section 2 of the Sherman Act. Next, plaintiffs claim that NW and Simmons conspired to restrain trade in violation of Section 1 and conspired to monopolize or attempt to monopolize the Detroit regional airline market in violation of Section 2.

1. Northwest's Acquisition of Republic.

In response to plaintiffs' claims that the acquisition of Republic by NW violated Section 1 and 2, NW argues that plaintiffs are precluded from collaterally attacking the lawfulness of the Republic acquisition because the acquisition was subject to mandatory administrative review from which appeal could have been taken to the United States Court of Appeals for the District of Columbia. 49 U.S.C. app. § 1378 (1982 & Supp. 1985). The Federal Aviation Act requires DOT approval of acquisitions similar to that proposed by NW. Section 1378(b)(1) mandates rejection of the transaction:

> (A) if it would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of air transportation in any region of the United States; or
> (B) the effect of which in any region of the United States may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Board finds that the antitcompetitive effects of the proposed transaction are outweighed in the public interest by the probable effect of the transaction in meeting significant transportation conveniences and needs of the public, and unless it finds that such significant transportation conveniences and needs may not be satisfied by a reasonably available alternative having materially less anticompetitive effects.

In addition, approval of the transaction should be denied if it would not be consistent with the public interest.

All interested persons can participate in the approval process, including the hearing before the Civil Aeronautics Board ("CAB"). In the instant case, participants included eight other airlines, the Minneapolis/St. Paul Metropolitan Airport Commission, the Michigan Department of Transportation, and the Antitrust Division of the United States Department of Justice. The Justice Department opposed the acquisition. The DOT approval of the acquisition is subject to review by the United States Court of Appeals for the District of Columbia, upon the appeal by any person with a "substantial interest" in the approval. 49 U.S.C. app. § 1486(a). The Court of Appeals for the District of Columbia shall have "exclusive jurisdiction" to review the determination of the CAB or the DOT. 49 U.S.C. app. § 1486(d).

Relying on Supreme Court and Court of Appeals decisions interpreting statutory procedures similar to the above-mentioned procedures, NW asserts that FBA had the opportunity to challenge the acquisition and is precluded from relitigating identical issues in a second forum.

The seminal case in this area of law is *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1957). In *City of Tacoma*, the City applied for a license under the Federal Powers Act to construct and operate a hydro-electric power plant by damming the Cowlitz River. The project necessarily involved the condemning of a fish hatchery owned by the state of Washington. The State objected to the issuance of the license, and following an administrative hearing conducted by the Federal Power Commission, the City was awarded the license. The State appealed the decision, but the Court of Appeals affirmed. Subsequently the City commenced a state action for a judgment declaring valid a bond issue to finance the project, and the state court

enjoined the City. The Washington Supreme Court affirmed on the grounds that the City was not authorized to condemn state-owned property.

The Supreme Court reversed, noting that the language of the Federal Powers Act, which is essentially the same language as that contained in the Federal Aviation Act, vested exclusive review of the Commission's decision in the Court of Appeals. Consequently, the Court reasoned that the parties were precluded from relitigating all issues "inhering in the controversy," which included the issue before the Washington state courts.

In a more recent case, the Supreme Court broadened the holding of *City of Tacoma* to preclude relitigation, not only by persons who participated in the administrative proceeding and appeal therefrom, but also persons whose interests were at stake and had an opportunity to participate in the administrative proceeding and seek appeal therefrom. *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 72 (1970). *See also North American Savings Ass'n. v. Federal Home Loan Bank Board*, 755 F.2d 122 (8th Cir. 1985).

Plaintiffs' claims challenging the lawfulness of the Republic acquisition on antitrust grounds are essentially the same issues resolved by the CAB in the administrative proceeding from which appeal was not taken. Certainly, FBA had a "substantial interest" in the approval within the meaning of the Act. Accordingly, the holding of *City of Tacoma* and *Marine Terminal* encompass the facts of the present case and preclude the plaintiffs from collaterally attacking the acquisition. This is so, despite the fact that plaintiffs chose not to participate in the

administrative proceeding.[5]

2. Conspiracy to Violate Section 1 and Section 2.

In response to plaintiffs' claims that NW and Simmons conspired to violate Section 1 and Section 2, both defendants seem to focus their argument on plaintiffs' alleged failure to proffer sufficient evidence of concerted activity, although each defendant raises alternative grounds for rejecting plaintiffs' claims, such as the restraint of trade was reasonable or that there was no antitrust injury. The court agrees that plaintiffs have not provided sufficient evidence of a conspiracy to violate Section 1 and Section 2 that injured FBA. The court will not rule on defendants' alternative arguments for rejecting plaintiffs' antitrust claims, other than to note that upon cursory review of these alternative arguments, the court is skeptical that any of these grounds could support a motion for summary judgment.

Any discussion regarding concerted activity in the context of Section 1 and 2 of the Sherman Act should begin with *Monsanto Co. v. Spray-Right Service Corp.*, 465 U.S. 752 (1983). In *Monsanto* the defendant, a manufacturer of agricultural chemicals, refused to renew plaintiff's distributorship because, according to defendant, plaintiff failed to adequately train its salesmen and promote sales to customers. Plaintiff

[5]The court recognizes and is troubled by the dilemma imposed upon a person in the plaintiffs' position as a result of the court's ruling. FBA was in the awkward position of having to choose between risking its present and future business relationship with NW by opposing the acquisition in the administrative proceeding or be precluded from relitigating the antitrust issues at a future date. Nevertheless, the court feels constrained to abide by the precedent established by the Supreme Court and the Eighth Circuit. Moreover, the court appreciates the countervailing economic and societal benefits derived from attaching finality to issues resolved by administrative agencies and Courts of Appeals.

An additional aside concerns the failure of the DOT to grant NW immunity pursuant to 49 U.S.C. § 1384. Statutory immunity, however, is a separate and distinct issue from the preclusion issue raised by NW.

argued and the Court of Appeals agreed that evidence of numerous complaints to defendant by competing distributors about plaintiff's price-cutting practices was sufficient evidence to establish a conspiracy to set prices.

First, the Supreme Court emphasized that in distributor termination cases a manufacturer "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Id.* at 760-61. This is so, despite the fact that in many cases unilaterial nonprice restrictions are inherently anti-competitive and restrain trade, although the focus of the restraint is on intrabrand competition. Then the court expressed concern that the positive economic benefits of nonprice restrictions would be seriously eroded if ambiguous evidence such as normal and indeed necessary distributor/manufacturer communications is allowed to create an inference of concerted activity. To protect against such erosion, the *Monsanto* Court elevated the burden antitrust plaintiffs must bear to establish concerted activity. The Court stated that "[t]here must be evidence that tends to exclude the possibility that the manufacturer and the non-terminated distributors were acting independently."*Id.* at 764. In addition, "plaintiffs should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' "[6] *Id.*

More recently the Supreme Court has reaffirmed the elevated evidentiary standard adopted in *Monsanto*, in *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 588 (1985). In *Matsushita*, the plaintiffs alleged that defendants conspired to monopolize a particular market through predatory pricing. The Court stated that although " 'on summary judgment, the inferences to be drawn from the underlying facts...must be viewed in

[6] "A common scheme" requires that evidence "be presented both that the distributor communicated its acquiesence or agreement, and that this was sought by the manufacturer." *Monsanto*, 465 U.S. at 764 n. 9.

the light most favorable to the party opposing the motion...' [the] antitrust law limits the range of permissible inferences from ambiguous evidence...so that conduct consistent with permissible competition as well as illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 587-88 (citations omitted). Instead, a plaintiff "must show that the inference of conspiracy is reasonable in light of the competing inference of independent action or collusive action that could not have harmed [the plaintiff]. *Id.* at 588. Moreover, the Court stated that when plaintiffs' claim makes no economic sense, plaintiffs "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587.

It is in the shadow of *Monsanto* and *Matsushita* that the court reviews the plaintiffs' alleged inferences.[7] In their memorandum, plaintiffs seem to offer two alternative arguments in support of finding concerted activity.[8] First, plaintiffs argue that NW and Simmons conspired to terminate FBA if FBA did not consent to the market division demanded by Simmons. In their memorandum, plaintiffs list 16 "items of evidence" that they allege establishes the existence of the conspiracy. Upon careful review of the 16 "items of evidence," however, the court concludes that the proffered "evidence" does not establish a reasonable inference of conspiracy in light of the competing inference of independent action.

While the court intends to review plaintiffs' list of "evidence" in some detail, the "evidence" contained in numbers 1, 3, 4, 5 and 16 will not be discussed because the facts or conduct described in these numbered items are consistent with a unilateral decision by NW to

[7] The United States Court of Appeals for the Eighth Circuit has followed the holding of *Monsanto*. *See, e.g., Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 589 (8th Cir. 1987); *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 523 (8th Cir. 1987); *Pumps & Power Co. v. Southern States Industries, Inc.*, 787 F.2d 1252, 1256-57 (8th Cir. 1986).

[8] Plaintiffs' second argument is addressed in footnote 13.

terminate FBA.[9] Moreover, the "evidence" contained in numbers 8 and 14 are not sufficiently specific to allow a response.[10] The record is too voluminous to locate inconsistencies other than those referred to in the plaintiffs' memorandum.

Plaintiffs' "item of evidence" number 2 refers to "Simmons' admission that it demanded certain markets exclusively, with the knowledge that the result of its demand would be the exclusion of Fischer Brothers." Simmons' demand of exclusivity, standing alone, does not evidence conspiracy. Indeed, FBA admits to making a similar demand. Moreover, plaintiffs' statement regarding Simmons' state of knowledge is not evidence but merely a conclusory allegation.

Plaintiffs' "item of evidence" number 7 refers to a "secret" meeting between NW and Simmons that was held after the September 12 meeting in Minneapolis and before the September 22-23 meeting. The purpose of the meeting was to define the scope of the Detroit market, and reach a proposed agreement between Simmons and NW on dividing the market. Plaintiffs argue that this meeting shows NW and Simmons agreed

---

[9] Plaintiffs' "item of evidence" numbers 1, 3, 4, 5 and 16 read as follows:

> 1. Northwest's admission that it terminated Fischer Bros. for failure to reach an agreement with Simmons;
> 3. Northwest's financial interest in Simmons, and its desire to sell its interest at a profit;
> 4. the personal relationship between Rasmusson and the principals of Simmons;
> 5. the presence of Rasmusson at the September 22-23 meetings in Chicago; and
> 16. the filing of Simmons' cross-claim against Northwest as a "friendly lawsuit."

[10] Plaintiffs' "item of evidence" numbers 8 and 14 read as follows:

> 8. the inconsistency between the testimony of Rasmusson and the Simmons' principals; and
> 14. the credibility problems and discrepancies in testimony of major witnesses in this case, including Rasmusson, Magary, Hall, Rothmeier, Abbott, Murray, and Piper.

that FBA was going to be terminated. Viewed in context, however, the meeting shows nothing of the sort.

As stated above, the "secret" meeting occurred after the September 12 meeting wherein FBA agreed in principle to sell its airline to Simmons but before the September 22-23 meeting. Moreover, the NW memo dated September 22 that summarized the discussions at the "secret" meeting stated, "[t]he outcome of the meeting seems to be that Simmons will *acquire* Fischer Brothers and use their airplanes for expansion." Brewer deposition at 46-47 (emphasis added). Accordingly, the meeting is inconsistent with or at least neutral concerning plaintiffs' allegation of conspiratorial termination.

In "item of evidence" numbers 10 and 12 plaintiffs state that NW's conduct in light of its opinion that it had no contractual duties or obligations to Simmons provides evidence of a conspiracy to terminate FBA. To support this conclusion plaintiffs relied on the deposition of Terry L. Hall, corporate counsel for NW. In his deposition, Hall states that prior to actual merger, NW did not have any contractual duties or obligations to Simmons or Express. Hall went on to indicate, however, that it was his opinion that when the acquisition was completed, NW would be contractually obligated to Simmons and Express. Accordingly, item numbers 10 and 12 misrepresent NW's position regarding NW's contractual obligations to Simmons, and provides no support to plaintiffs' claim of conspiratorial termination.

Plaintiffs "item of evidence" number 11 refers to NW's "admission that it permitted Simmons to exercise veto power over any route to be given to FBA prior to the September 24 cancellation." Essentially, both Simmons and FBA had veto power over any proposed route division offered by the other because NW stated the division of routes should be mutually agreeable to both the regional carriers in the particular market. Second,

NW denies that prior to September 24, Simmons had the type of one-sided "veto power" plaintiffs suggest. Consequently, the only evidence regarding such "veto power" is the testimony of FBA officials. This testimony, however, is contradicted somewhat by the telephone conversations surreptitiously taped by plaintiffs which do not suggest NW believed Simmons had the type of one-sided "veto power" plaintiffs are intimating.

Plaintiffs' strongest "evidence" of concerted activity is contained in item numbers 6, 13 and 15. Construing the information contained in item numbers 6, 13 and 15 in a light most favorable to plaintiffs, plaintiffs have established that after Simmons and FBA failed to reach a specific agreement concerning the sale of FBA, Simmons contacted NW, NW sent a notice of termination to FBA, and Simmons revoked its offer to purchase FBA.[11]

Standing alone, this evidence might allow a fact finder to draw the inference that NW agreed to terminate FBA at Simmons' urging. NW asserts and the court agrees, however, that the inference of conspiracy suggested by plaintiffs is unreasonable in light of the competing inference of independent action suggested by NW. NW's claim of independent action is also responsive to plaintiffs' sole remaining "item of evidence," item number 9.[12]

NW asserts that following the acquisition of Republic, it was confronted with the undesirable, from its perspective, situation of having two regional carriers serving overlapping routes at Detroit and Minneapolis/St. Paul. NW had several options available

---

[11] Both defendants refute the contentions in plaintiffs' items 6, 13, and 15. NW argues that it ws one of the Fischer brothers who contacted Rasmusson following the breakdown in negotiations, while Simmons argues that it did not find out about the notice of termination until several weeks following the actual notice.

[12] Plaintiffs "item of evidence" number 9 reads as follows:

> 9. the inability of Northwest to present a coherent, consistent explanation of the decision to terminate Fischer Bros..

to remedy the situation. First, NW could have terminated the contract of one of the two carriers, either lawfully by satisfying the notice requirement if such a provision existed, or by breaching the contract, hence subjecting itself to a breach of contract action. Second, NW could have unilaterally decided how the routes were to be divided among the carriers, and impose this division upon the carriers, again exposing itself to a breach of contract action given the exclusivity provisions contained in most if not all of the contracts. Third, NW could have requested that the carriers mutually agree to divide the routes between themselves, with the implicit understanding that if no mutual agreement was reached, then Northwest would be forced to choose one of the two previously mentioned methods of resolving the situation.[13] NW claims that it chose to implement the third option. As evidence of this choice, NW notes that Mesaba and Express mutually agree on a division of the routes at Minneapolis/St. Paul.

NW further asserts that it became evident following the September 22-23 meeting in Chicago that FBA and Simmons were not going to mutually agree upon either the division of routes or the sale of FBA to Simmons.

---

[13] As the court interprets the plaintiffs' memorandum, FBA argues that his third alternative also constitutes concerted activity. In other words, plaintiffs seem to argue that by requesting FBA and Simmons to divide the Detroit routes and by terminating FBA because a mutually agreeable division was not accomplished, the request and the termintion, even if the termination was unilateral, constitutes a conspiracy. The court disagrees.

While it might be that if Simmons and FBA agreed to divide routes, such conduct might establish concerted activity in a suit brought by a passenger alleging increased fares as a result of the territorial allocations, FBA's alleged injury does not flow from the attempted agreement to divide the Detroit routes. *Matsushita*, 475 U.S. at 586 (conspiracy must have caused plaintiffs to suffer an antitrust injury); *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489 (1977). Instead, the alleged injury was caused by the termination, and if such termination was the result of a unilateral decision by Northwest, then there is no concerted activity for which FBA has an injury.

Consequently, NW was forced to decide whether to divide the routes itself and impose this division upon FBA and Simmons or terminate FBA.[14] Unilaterally imposing a route division on FBA and Simmons would have exposed NW to a breach of contract action by both carriers because of the exclusivity provisions contained in their respective contracts. Accordingly, NW argues that the language of the respective contracts explains and justifies its unilateral decision to terminate FBA.

In sum, plaintiffs have failed to provide evidence that tends to exclude the possibility that NW acted independently when terminating FBA. Consequently, plaintiffs' inference of conspiracy is unreasonable in light of the competing inference of independent action. Moreover, plaintiffs have not provided sufficient direct and circumstantial evidence that reasonably tends to prove that NW and Simmons had a conscious commitment to a common scheme to terminate FBA.

B. Claims for Interference with Prospective Advantage and Interference with Contract.

In their first amended complaint, plaintiffs allege that Simmons intentionally "enticed" NW to breach its contract with FBA. In addition, plaintiffs allege that both defendants conspired to interfere with FBA's "prospective advantage." With regard to plaintiffs' claim

[14]NW did not consider terminating Simmons because, unlike the FBA contract, the Simmons contract did not allow for termination without cause upon giving six months' notice. Instead, the Simmons contract could not be terminated until October 29, 1988, without breaching the terms of the contract.

of interference with prospective advantage,[15] both defendants erroneously assumed plaintiffs' claim was directed at FBA's business relationship with NW. Instead, plaintiffs' counsel informed the court at oral argument[16] that the claim was directed at defendants' alleged interference with FBA's business relationships with its future customers.

Both of the above tort claims are based upon an alleged agreement between NW and Simmons to terminate FBA. Plaintiffs, however, have simply failed to create a factual issue regarding the existence of an agreement to terminate FBA. The court concurs with Simmons' suggestion that the disposition of plaintiffs' tort claims should follow the disposition of plaintiffs' antitrust claims. Without a conspiracy to terminate FBA, NW had legal justification to invoke the termination provision of the contract,[17] and Simmons can rely on Restatement (Second) of Torts § 768(1) (1979).

C. Fraud Claim.

Plaintiffs allege that NW fradulently misrepresented its intention to perform under the FBA contract. Normally, the knowing false representation must be of a *past* or *present* material fact. *See Florenzano v. Olson*, 387 N.W.2d 168, 174 n. 4 (Minn. 1986). Consequently, a

[15] Interference with prospective advantage is also know as wrongful interference with business relationships and interference with contractual relations. *See Wild v. Rarig*, 234 N.W.2d 775, 790-91 n. 16 (Minn. 1975).

[16] For some unknown reason, plaintiffs' memorandum did not address the issue of interference with prospective advantage.

[17] In addition, plaintiffs' tort claim against Northwest is subject to mandatory arbitration which is now time-barred. The "arising out of or relates to" language of the arbitration clause includes tort, as well as contract claims, which involve a significant aspect of the contractual relationship. *Cf. Morgan v. Smith, Barney, Harris, Upham & Co.*, 729 F.2d 1163, 1167 (8th Cir. 1984). Plaintiffs' claim that Northwest interfered with FBA's prospective advantage by terminating the FBA contract pursuant to a conspiracy is a dispute that arises out of or relates to the contract.

representation "as to a future act is an insufficient basis to support an action for fraud merely because the represented act or event does not take place." *Vandeputte v. Soderholm*, 216 N.W.2d 144, 147 (Minn. 1974). It is true, however, that a misrepresentation of a present intent to perform a specific act in the future could amount to fraud. *Id.* Plaintiffs must show that the promisor (NW) had no intention to perform at the time the promise was made. *Id.*

Based upon the record before the court, plaintiffs have failed to show that at the time NW entered into the contract with FBA it had no intention to comply with the terms of the contract, including the exclusivity provision. NW and Republic had yet to reach an agreement concerning acquisition. Moreover, any such agreement would be subject to DOT approval. These contingencies prevented any certainty concerning the inability of NW to comply with the exclusivity provision. Perhaps more important, NW could have complied fully with the exclusivity provision, if following DOT approval but prior to integration with Republic, it would have unilaterally terminated FBA's contract pursuant to the termination provision contained in the contract.

In addition, plaintiffs' fraud claim is subject to mandatory arbitration which is now time-barred. Contrary to plaintiffs' assertions otherwise, the Arbitration Act establishes that a court must apply federal law to resolve the issue of whether the question of fraud in the inducement is itself an arbitrable controversy. *Moses H. Cone Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-404 (1967).

The federal law principles governing the arbitrability of fraud in the inducement claim are well settled. If the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it. *Prima Paint*, 388 U.S. at 403-404. The language and policy of the Arbitration Act,

however, requires that allegations of fraud in the inducement of the entire contract be considered arbitrable. *E.g., Moses H. Cone*, 460 U.S. at 24; *Prima Paint*, 388 U.S. at 404. Since plaintiffs' claim is directed at fraud in the inducement as the entire contract, this claim is subject to the arbitration clause.

D. Breach of Contract and Breach of Covenant of Good Faith and Fair Dealing.

In their first amended complaint, plaintiffs allege NW breached the FBA contract by failing to comply with the exclusivity and expansion provisions. In addition, plaintiffs allege NW's conduct constituted a breach of the covenant of good faith and fair dealing implied by the contract. NW argues that these claims are subject to mandatory arbitration which is now time-barred.[18] Plaintiffs argue that FBA was not required to arbitrate its contract claims.

The court must determine whether the parties agreed to arbitrate their dispute. *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1984). As indicated above, whether the parties agreed to arbitrate is determined by applying "federal substantive law of arbitrability..." *Moses H. Cone*, 460 U.S. at 24. That body of law counsels:

> That questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration whether the problem at hand is the

---

[18] The arbitration clause reads, in part, as follows:

(a) Any dispute, controversy or claim between the Parties, as to which there are no other necessary or indispensable parties, arising out of or relating to this Agreement, including its breach, or the transactions contemplated by this Agreement, which cannot be resolved amicably by the Parties, shall be referred to arbitration within 120 days of the date of the alleged breach occurred.

> construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability.

Moses H. Cone, 460 U.S. at 24-25.

Plaintiffs offer three arguments against enforcement of the arbitration clause. First, plaintiffs assert that the language of the arbitration clause itself make arbitration inapplicable given the facts of this case. Specifically, plaintiffs emphasize the language that "[a]ny dispute...which cannot be resolved amicably by the Parties shall be referred to arbitration within 120 days of the date of the alleged breach." Plaintiffs argue that after NW's various breaches of the expressed and implied terms of the contract, NW deceitfully led FBA to believe that their dispute could be resolved amicably. Plaintiffs further argue that when they discovered NW did not intend to resolve the dispute amicably, 120 days had lapsed since the date of the various breaches. Accordingly, plaintiffs contend the "resolved amicably" language makes the arbitration clause inapplicable in the present case.

While the court is somewhat troubled by the ambiguous "resolved amicably" language contained in the arbitration clause, as indicated, federal policy regarding arbitration requires resolving any close question in favor of arbitrability. With that federal policy in mind, the court rejects the plaintiffs' interpretation of the arbitration clause in question. The court finds either of two alternative interpretations of the arbitration clause more reasonable given the language of the arbitration provision and the federal policy underlying arbitration.

First, the language could be interpreted to require plaintiffs to request arbitration within 120 days of the breach if not resolved by then, even though the parties are continuing their effort to resolve the dispute amicably. Second, the language could be interpreted to require plaintiffs to request arbitration within 120 days after it became apparent that the dispute would not be

resolved amicably. Based on either interpretation, plaintiffs have failed to comply with the arbitration provision.

Next, plaintiffs argue that Simmons is a necessary and indispensable party to the breach of contract claims. In response, NW refers the court's attention to *Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc.*, 564 F.2d 816 (8th Cir. 1977), a decision authored by this court while sitting by designation with the United States Court of Appeals for the Eighth Circuit. Upon reviewing *Helzberg*, the court finds it on all fours with the instant case. In *Helzberg* the court held that "a person does not become indispensable to an action to determine rights or obligations under a contract simply because that person's rights or obligations under an entirely separate contract will be affected by the result of the action." *Id.* at 820.

Finally, plaintiffs argue that NW waived its right to arbitration and is estopped from asserting arbitration as a defense to FBA's contract claims. The typical waiver case involves a litigant attempting to rely on an arbitration clause in the eleventh hour of the litigation process. *See, e.g., National Foundation for Cancer Research v. A. G. Edwards & Son, Inc.*, 821 F.2d 772 (D.C. Cir. 1987); *Price v. Drexall Burnan Lambert, Inc.*, 791 F.2d 1156 (5th Cir 1986); *Reid Burton Const. v. Carpenters Dist. Council*, 614 F.2d 698 (10th Cir. 1980). A court must consider whether the conduct of the party invoking the arbitration clause was clearly inconsistent with that party's intent to arbitrate.

In the present case, NW's conduct is perfectly consistent with its right to invoke the arbitration clause as a bar to plaintiffs' contract claims. Contrary to plaintiffs' intimations otherwise, NW had no obligation to seek arbitration within the 120-day time limitation. It is FBA who is the alleged aggrieved party, not NW. NW expressly asserted its arbitration defense in its answer to plaintiffs' complaint, and its participation in

the lawsuit does not amount to a waiver of this defense.

Based upon the file as presently constituted and the foregoing discussion,

IT IS ORDERED That defendants' motions for summary judgment are granted.

IT IS FURTHER ORDERED That the Clerk enter judgment as follows:

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED That plaintiffs William R. Fischer, The Estate of Betty L. Fischer, Montford R. Fischer and Bonita G. Fischer have and recover nothing on their claims against defendants NWA, Inc, Northwest Airlines, Inc., and Simmons Airlines, Inc., and their claims shall be dismissed with prejudice.

DATED: June 9, 1988.

DONALD D. ALSOP
Chief U. S. District Judge

APPENDIX C

United States District Court
District of Minnesota
Third Division

3-87 CIV 106

WILLIAM R. FISCHER,
The Estate of BETTY L. FISCHER,
MONTFORD R. FISCHER and BONITA G. FISCHER,
Plaintiffs,

v.

NWA, INC.; NORTHWEST AIRLINES, INC;
and SIMMONS AIRLINES, INC.,
Defendants.

ORDER FOR FINAL JUDGMENT

On June 9, 1988, this court entered its order granting the motion of the defendants and each of them for summary judgment. As a part of that order, the court ordered the entry of judgment dismissing the claims of the plaintiffs, without having made the requisite finding under rule 54(b). Thereafter, the cross claim of the defendant Simmons Airlines, Inc., against NWA, Inc., and Northwest Airlines, Inc., was dismissed by stipulation of the parties and with prejudice, all as shown

by the order of the court dated June 25, 1988.

It now appearing that all claims in the action have been disposed of, it is appropriate that final judgment be entered.

Accordingly,

IT IS ORDERED That the Clerk forthwith enter judgment as follows:

AMENDED JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED That plaintiffs William R. Fischer, The Estate of Betty L. Fischer, Montford R. Fischer, and Bonita G. Fischer have and recover nothing on their claims against defendants NWA, Inc., Northwest Airlines, Inc., and Simmons Airlines, Inc., and their claims are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the defendant Simmons Airlines, Inc., have and recover nothing of the defendants NWA, Inc., and Northwest Airlines, Inc., and the cross claim of Simmons Airlines, Inc., is dismissed with prejudice.

DATED: June 25, 1988.

DONALD D. ALSOP
Chief U. S. District Judge

APPENDIX D

United States Court of Appeals

For the Eighth Circuit

No. 88-5258-MN

WILLIAM R. FISCHER, et al.,

Appellants,

vs.

NWA, INC., NORTHWEST AIRLINES, INC., et al,

Appellees.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appellants' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge McMillian would have granted the petition.

Petition for rehearing by the panel is also denied.

DATED: October 18, 1989.

Order Entered at the Direction of the Court:

ROBERT D. ST. VINCENT
Clerk, United States Court of Appeals,
Eighth Circuit.

APPENDIX E

Sherman Antitrust Act, Section 1, 15 U.S.C. § 1 (1988):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Antitrust Act, Section 2, 15 U.S.C. § 2 (1988):

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

49 U.S.C. App. § 1384 (1988):

In any order made under section 1378, 1379, or 1382 of this title, the Board may, as part of such order, exempt any person affected by such order from the operations of the "antitrust laws" set forth in subsection (a) of section 12 of Title 15 to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those

transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest. Notwithstanding the preceding sentence, on the basis of the findings required by subsection (a)(2)(A)(i) of section 1382 of this title, the Board shall, as part of any order under such section which approves any contract, agreement, or request or any modification or cancellation thereof, exempt any person affected by such order from the operations of the "anti-trust laws" set forth in subsection (a) of section 12 of Title 15 to the extent necesary to enable such person to proceed with the transaction specifically approved by the Board in such order and with those transactions necessarily contemplated by such order.

APPENDIX F

United States District Court
District of Minnesota
Third Division

APPEALS CIVIL NO. 3-86-0391
Consolidated with CIVIL FILE NO. 3-87-534

INTERNATIONAL TRAVEL ARRANGERS,
a corporation,

Plaintiff,

v.

NWA, INC., NORTHWEST AIRLINES, INC.,
REPUBLIC AIRLINES, INC.,
MAINLINE TRAVEL, INC.[1],

Defendants.

MEMORANDUM AND ORDER

HAROLD J. TOMIN, Esq.
Tomin & Anglin
1900 Avenue of the Stars
Suite 2300
Los Angles, California 90067

DANIEL R. SHULMAN, Esq.
NANCY R. MENZEL, Esq.
Gray, Plant, Mooty, Mooty & Bennett
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402

For the plaintiff.

RONALD D. EASTMAN, Esq.
DAVID F. WILLIAMS, Esq.
MICHAEL B. QUIGLEY, Esq.
Cadwalader, Wickersham & Taft
1333 New Hampshire Avenue N.W.
Suite 700
Washington, D.C. 20036

PETER S. HENDRIXSON, Esq.
MARK B. ROTENBERG, Esq.
MICHAEL A. LINDSAY, Esq.
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, Minnesota 55402
For the Defendants.

[1]The pleadings and documents in the clerk's file have a number of different captions, listing additional defendants. However, the supplemental complaint filed on October 28, 1988, identifies only the defendants named here. The court assumes that the other defendants are no longer parties to this action.

This matter is before the court upon cross motions for summary judgment. Defendants seek sumary judgment on all of plaintiff's claims. Plaintiff opposes defendants' motion and moves for summary judgment on its claims for breach of contract and breach of covenant of good faith and fair dealing. For the reasons set forth below the court grants these motions in part and denies them in part.

FACTUAL BACKGROUND

The plaintiff in this action International Travel Arrangers (ITA), is a Minneapolis/St. Paul based wholesale tour operator. ITA operates charters from the Twin Cities to various vaction destinations. ITA commonly packages air travel with a number of ground amenities, such as hotel accommodations, and sells the packages to consumers through travel agencies.

The defendants are all members of the NWA, Inc. corporate family. Northwest Airlines, Inc. (Northwest) is the fourth largest scheduled airline in the United States. Northwest maintains its headquarters in Minneapolis/St. Paul. In addition to its scheduled service, offered directly to consumers, Northwest has chartered aircraft to ITA. Mainline Travel, Inc. (MLT) is a company engaged in the wholesale tour business. MLT was an independent corporation until it was acquired by NWA in October 1985. Republic Airlines, Inc. (Republic) was an independent scheduled airline until NWA acquired it in 1986.

MLT and ITA are the largest and second-largest Twin Cities-based tour operators respectively. Six other tour operators are based in the Twin Cities, and a number of other tour companies sell tours in the Twin Cities market. The relevant market for purposes of this litigation involves air transportation between Minneapolis/St. Paul (MSP) and various domestic and international destinations. More particularly, ITA complains of defendants' activities in the air vacation package market and the discretionary non-package market known as "visiting friends and relatives" (VFR). The city pairs at issue are MSP-Las Vegas (LAS), MSP-Hawaii, MSP-Phoenix (PHX), MSP-Orlando (MCO),

MSP-Tampa (TPA), MSP-Ft. Meyer (RSW), MSP-Los Angeles (LAX), MSP-San Francisco (SFO), MSP-San Diego (SAN), MSP-London, and MSP-Frankfurt (FRA).

ITA, MLT, and other tour operators are unique entities in that they are both customers and competitors of the scheduled airlines. Prior to December of 1972 charter companies were restricted in their ability to compete with regularly scheduled airlines. They operated primarily by chartering entire aircraft and selling seats to the public. Then, the Civil Aeronautics Board (CAB) approved the travel group charter concept and liberalized regulations upon charter companies. The actions of the CAB, and its successor the Department of Transportation (DOT), allowed tour operators to purchase blocks of seats on regularly scheduled air service and to resell the seats to the public. The tour operators usually sold air travel packages at a substantially lower price that the fares offered by the airlines to consumers for regularly scheduled flights to the same destination. This type of contract bulk fare arrangement, coupled with traditional charter arrangements, have allowed tour operators to compete more effectively with scheduled air carriers. In the past, ITA has utilized Northwest, Republic, and other carriers in purchasing charters and bulk seats.

In the early and mid-1980s the tour operator segment of the air transportation industry experienced strong growth. Major air carriers began to enter the business by forming their own in-house tour divisions. Northwest decided to get involved by acquiring an interest in a going concern. On May 27, 1985, NWA announced its intention to acquire MLT. NWA also intended to acquire Sun Country Airlines, a small Twin Cities-based charter carrier, but abandoned this plan due to opposition from Sun Country shareholders.

On June 13, 1985, NWA filed a petition with the DOT requesting exemption from the provisions of the Federal Aviation Act that require formal DOT approval before such an acquistion may occur. In the alternative, NWA sought prior approval of the transaction. In the absence of opposition by ITA or anyone else, the DOT granted NWA's

petition for exemption. The DOT concluded that the acquisition was "not likely to have anticompetitive effects or to be otherwise inconsistent with the public interest." *Application of NWA, Inc.*, DOT Order 85-7-70 at 3 (July 30, 1985). The DOT noted, however, that "NWA has not requested, and will not receive, antitrust immunity for this transaction. The antitrust laws will, therefore, remain available as a remedy if NWA's acquisition later presents a threat to competition." *Id.*

In 1985 NWA also contemplated acquisition of Republic. At the time Northwest was primarily a long-haul domestic and international carrier and possessed a fleet of larger, long-range aircraft. Republic, in contrast, utilized mostly smaller, narrow-body aircraft on its shorter domestic "feeder" route system. On January 28, 1986, NWA and Republic applied to the DOT for approval of their merger. The DOT ordered that a trial be conducted before an administrative law judge. A number of parties participated in the proceedings, and the Department of Justice actively opposed the merger. ITA did not take part in the hearing. Based on the record of the hearing and the administrative law judge's recommendation, the DOT approved the transaction. *See Northwest-Republic Acquisition case*, DOT Order 86-7-81 (July 31, 1986).

During the mid-1980s ITA obtained the majority of its charter and bulk lift seats from Northwest. For example, during ITA's winter 1985 season (January-April 1985) Northwest provided over 65 percent of ITA's lift. ITA was Northwest's only tour operator charter during the winter 1985 season. ITA claims that it had a similar arrangement with Northwest for the winter 1986 season. ITA contends that while Northwest was contemplating acquision of MLT, the defendants took a number of steps that breached the contractual arrangement between ITA and Northwest, violated the antitrust laws, constituted fraud, and deprived ITA of a prospective economic advantage.

Although the theories underlying ITA's complaint are distinct, the acts constituting the alleged wrongs are

substantially the same for each claim. ITA asserts that Northwest conspired to put ITA our of business by launching a multi-pronged attack on ITA's winter 1986 program, and later by sabotaging ITA's summer 1988 program. At this time the court deems it unnecessary to describe each alleged at of wrong doing, but a general description of ITA's allegations is necessary in order to put the claims in context.

In recent years the "hub and spoke" system has become the dominant mode of operation in the airline industry. In this system a carrier is based in one or more "hubs" that are connected to various destinations by "spokes." Flights between two cities ordinarily stop at the carrier's hub before proceeding to the final destination, but direct flights are common when one of the cities is a hub. Northwest is the only major airline with a hub at MSP. ITA contends that this fact, combined with Northwest's acquisition of MLT and Republic, has allowed Northwest to control the price and restrict the supply of air travel between MSP and certain cities. ITA claims that competition between MLT, Sun Country Airlines and Northwest has been virtually eliminated. Consequently, Northwest has been able to engage in a number of practices designed to reduce competition in general and to injure ITA specifically. Some of these actions also form the basis for ITA's other claims.

According to ITA, by spring of 1985 Northwest and ITA had reached an agreement whereby ITA would enjoy first call on all of Northwest's available wide-body aircraft for the winter 1986 season. Northwest disputes the existence of any contract to this effect, but ITA claims that the contract is memorialized in a letter from Stephen Russell, the president of ITA, to Fay Beuchine, Northwest's Director of Charter and Incentive Travel. Assuming that a contract existed, ITA claims that Timothy Skoog, Northwest's Director of Tour and Leisure Marketing, met with Russell on June 20, 1985, and forced Russell to agree to a number of contract

modifications. Northwest allegedly coerced ITA into relinquishing its exclusive arrangement with Northwest and sharing lift with MLT. ITA maintains that in the terms of the "agreement" reached on June 20 Northwest promised to treat ITA and MLT with parity with respect to both prices and departure times and to allow ITA to maintain its exclusive right to Orlando charters. Again, Northwest disputes the existence of any such contract.

ITA cites a number of specific acts by which Northwest breached its agreement. First, MLT allegedly received discount prices for seats on some of its charters. On the MSP-LAS charter, for example, Northwest charged MLT $12 per seat less than it charged ITA. Second, MLT obtained lift on MSP-LAS flights departing MSP in the mid-morning, a more desirable time than ITA charters. Finally, Northwest sold MSP-MCO (Orlando) charters to MLT, in violation of its exclusive arrangement with ITA. ITA contends that Northwest instituted these changes in order to hurt ITA, MLT's major competitor, and ultimately to drive ITA from the market.

ITA points to additional anticompetitive conduct in the spring of 1988. Both ITA and MLT announced the prices for their summer 1988 programs on March 29, 1988. Soon thereafter, MLT and Northwest allegedly conspired to slash prices on those travel packages that were comparable to the ones offered by ITA. ITA was forced to match prices, cancel programs to some cities and downgrade service to others. After ITA cancellations, MLT raised its prices again.

This cause of action has a somewhat complicated

procedural history,[2] but for purposes of these motions the court must address the seven claims set forth in ITA's supplemental complaint:

1. Violation of § 7 of the Clayton Act (MLT Acquistion).
2. Violation of § 7 of the Clayton Act (Republic Acquistion).
3. Violation of §§ 1 and 2 of the Sherman Act.
4. Tortious Breach of the Duty of Good Faith and Fair Dealing.
5. Fraud.
6. Breach of Contract.
7. Interference with Contractural Relations and Prospective Economic Advantage.

ANALYSIS

In deciding cross-motions for summary judgment the court must apply the standards set forth in Fed. R. Civ. P. 56(c). Judgment shall be rendered for a moving party provided that the pleadings and materials on file demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. "Only disputes over facts that might affect the outcome ofthe suit under governing law will properly preclude the entry ofsummary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,248 (1986). the judge's functin at the summary

---

[2]The original complaint in this action was filed in April of 1986. In it ITA challenged NWA's acquisition of MLT. ITA filed a second action in August of 1987 challenging the acquisition of Republic. The two actions were consolidated on December 15, 1987. ITA filed a supplemental complaint on October 28, 1988.

Defendants' motion for summary judgment seeks dismissal of all of these claims. Plaintiff, on the other hand, requests summary judgment on its breach of contract claim and on defendants' fifth affirmative defense that plaintiff's antitrust claims are barred by collateral estoppel.

judgment stage is not to weigh the evidence, but to determine whether there is a genuine issue for trial. *Id.* at 249. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting *First National Bank fo Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968)).

I
Antitrust Claims

ITA has brought antitrust claims against the defendants pursuant to sections 4 and 16 of the Clayton Act to recover damages and to obtain injunctive relief for defendants' alleged violations of sections 1 and 2 of the Sherman Act, and section 7 of the Clayton Act. Section 7 of the Clayton Act prohibits a corporation form acquiring another corporation where "the effect of such acquisition may be substantially to lessen competition, or to tend to create amonopoly." 15 U.S.C. § 18. In its first claim, ITA alleges that NWA's acquistion of MLT tended to lessen trade and to create a monopoly. ITA seeks damages under § 4 of the Clayton Act, which provides: "Any person who shall be injured in his business or property to reason of anything in the antitrust laws ... shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 26. ITA's second claim challenges NWA's acquisition of Republic on the same grounds. ITA's third claim does not attack either acquisition per se. Instead, it alleges that the defendants have combined and conspired to restrain trade and monopolize air travel in the city pairs at issue, that defendants have attempted to monopolize such trade, and that they have in fact monopolized it, all in violation of sections 1 and 2 of the Sherman Act. 15 §§ 1 and 2.

A. Collateral Estoppel

As a first lne of defense against plaintiff's antitrust

claims, defendants contend that the actions of the DOT, as reflected in the orders of July 30, 1985, and July 31, 1986, preclude ITA from attacking any of defendants' actions on antitrust grounds. While this argument has some merit, defendants' position with respect to the DOT orders is too broad. The court must evaluate each of ITA's antitrust claims separately in order to determine whether they are barred by the DOT orders.

1. Northwest's Acquisition of Republic

The DOT order approving NWA's acquisition of Republic was issued under the authority of the Federal Aviation Act. The Act mandates rejection of the transaction:

> (A) if it would result in a monopoly or would be in furtherance of any combination or conspiray to monopolize or to attempt to monopolize the business of air transportation in any region of the United States; or (B) the effect of which in any region of the United States may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Board finds that the anticompetitive effects of the proposed transaction are outweighed in the public interest by the probable effect of the transaction in meeting significant transportation conveniences and needs of the public, and unless it finds that such significant transportation conveniences and needs may not be satisfied by a reasonably available alternative having materially less anticompetitive effects.

49 U.S.C. app. §1378(b)(1).

All interested persons may participate in the approval process. In the instant case a number of parties took part, including eight other airlines and the Department of Justice. ITA did not formally participate. DOT approval is subject to review by the United States Court of Appeals for the District of Columbia. The District of

Columbia Court has "exclusive jurisdiction" to review DOT determinations. 49 U.S.C. app. §. 1486(d). No appeal from the July 31, 1986, DOT order was taken.

Defendants argue that ITA had an opportunity to challenge the Republic acquisition in the administrative proceedings and that it is precluded from relitigating the identical issues in another forum. In the case of *Fischer v. NWA, Inc.*, slip. op. (D. Minn. June 9, 1988), *aff'd on other grounds*, 883 F.2d 594 (8th Cir. 1989), Chief Judge Donald D. Alsop embraced NWA's argument. In *Fischer* a regional airline company, Fischer Bros. Aviation (Fischer), had provided connecting flight service for Northwest at Detroit, Michigan. Simmons Airlines, Inc. (Simmons) had provided similar service for Republic. After NWA acquired Republic, Northwest chose to use Simmons as its exclusive regional airline in Detroit. Fischer filed suit asserting antitrust and common law claims. Judge Alsop granted summary judgment for NWA on the antitrust claims. He reviewed Eighth Circuit and Supreme Court precedent regarding the effect of provisions which mandate exclusive review of administrative decisions in the United States Courts of Appeals. *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1957) (State may not collaterally attack Federal Power Commission's grant of a license.); *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) (order of Federal Maritime Commission not subject to collateral attack); *North American Savings Ass'n. v. Federal Home Loan Bank Board*, 755 F.2d 122 (8th Cir. 1985) (district court lacks jurisdiction to review approval of branch offices by FSLIC and Federal Home Loan Bank Board). Judge Alsop extended the teaching of these cases to § 1486, concluding

> Plaintiffs' claims challenging the lawfulness of the Republic acquisition on antitrust grounds are essentially the same issues resolved by the CAB in the administrative proceeding from

> which appeal was not taken. Certainly, [Fischer] had a "substantial interest" in the approval within the meaning of the Act. Accordingly, the holding of *City of Tacoma* and *Marine Terminal* encompass the facts of the present case and preclude the plaintiffs from collaterally attacking the acquisition. This is so, despite the fact that plaintiffs chose not to participate in the administrative proceeding.

Fischer, slip. op. at 10 (footnote omitted).

Although the majority opinion on appeal in *Fischer* does not address the issue of collateral estoppel, Judge Earl R. Larson's dissent does. Judge Larson criticizes Judge Alsop for failing to consider the effect of the DOT's decision not to grant antitrust immunity to NWA with respect to the Republic transaction. The DOT has the authority when it approves an airline acquisition, to grant any affected party exemption from operation of the antitrust laws. Because the DOT did not grant immunity to NWA, Judge Larson would allow an antitrust action challenging the acquisition to go forward.

Since Judge Larson's dissent did not sway the majority of the panel, his opinion is not binding upon this court. However, ITA relies on Judge Larson's analysis of the history and purposes of §1384 to argue that Judge Alsop's discision in *Fischer* was incorrect. The court disagrees. Judge Larson's analysis of the history and purposes of § 1384 is sound, but his conclusion, that all issues decided by the DOT are open to challenge in an antitrust action, is unwarranted. Judge Alsop's approach, which protects the DOT's approval of the acquisition while allowing plaintiffs to challenge post-merger anticompetitive conduct, gives due respect for both the role of the DOT in approving mergers once and for all and the rights of injured parties to obtain redress for antitrust violations.

Section 1384 was enacted in 1978 along with amendments to the Federal Aviation Act. Prior to 1978,

CAB approval of an airline acquisition automatically conferred antitrust immunity on the transaction. The Supreme Court had liberally construed this grant of immunity, and in *Hughes Tool Co. v. TWA, Inc.*, 409 U.S. 363 (1973), the Court extended immunity farther than the CAB itself intended. In response, Congress considered legislation to limit the scope of antitrust immunity. Judge Larson cites language from the legislative history that is instructive. He notes that the amendments were designed to allow the CAB "to approve transactions for transportation purposes, but still refrain from conferring antitrust immunity on any or all aspects of the transaction." S. Rep. No. 95-631, 95th Cong. 2d Sess. 84-85 (1978), *quoted in Fischer*, 883 F.2d at ___ (Larson, J. dissenting). Further elaborating, one of the sponsors of the amendment stated

> the Board could, if it chose, approve of activities that it would not immunize...The Board will not have to always choose between disapproval and antitrust immunity, and the parties will know that they cannot misbehave after initial approval and expect to use a Federal law as a shield against antitrust liability.

124 Cong. Rec. 10687 (April 18, 1978) remarks of Sen. Kennedy). The House version embodied a similar concern about broad antitrust immunity. As Judge Larson observes, "the House bill conditioned any grant of immunity on the affirmative finding by the Board that such immunity was in the public interest." *Fischer*, 883 F.2d at ___ (Larson, J. dissenting) (citing H. Rep. No. 95-1211, 95th Cong. 2d Sess. 18 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3754). Congress ultimately adopted the House version. *See* House Conf. Rep. No. 95-1779, 95th Cong. 2d Sess. 78 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 3773, 3792.

The court need not expose the decision of the DOT to challenge in order to fulfill the purposes of § 1384.

The availability of remedies for post-merger anti-competitive activities insures that the parties involved will not be able to misbehave with impunity. On the other hand, the parties should not be subject to fear that DOT approval will be overturned and the acquisition undone. Out of respect for the administrative procedure described in the Federal Aviation Act and the exclusive review provisions set forth therein, this court must uphold the finality of the July 31, 1986 order. Therefore, ITA's second claim challenging the NWA/Republic merger itself must be dismissed.

2. The MLT Acquisition

The DOT's July 30, 1985 order is not entitled to the same deference. In exempting the MLT acquisition from the approval process, the DOT did not conduct a hearing or employ the searching analysis that characterized the Republic proceeding. No parties opposed NWA's request for exemption. Significantly, the DOT order states that NWA will not receive antitrust immunity for the transaction. The order further announces that the antitrust laws will "remain available as a remedy if NWA's acquisition later presents a threat to competition."

Defendants cite no case law in support of their contention that exemptions under 49 U.S.C. app. § 1386 of the Federal Aviation Act have the same preclusive effect as DOT orders approving acquisitions pursuant to § 1378. The DOT exempted the MLT acquisition from the formal review process on the basis of 14 C.F.R. § 380.44, which provides

> Air carriers...are hereby relieved from section 408(a), 409, and 412 of the Federal Aviation Act of 1958, as amended, to the extent necessary to permit them to acquire, control, have interlocking relationships with, or market charter tours in conjunction with charter operators, but only so long as they comply with the provisions of this part and the conditions imposed herein.

The regulation does not say that such acquisitions are immune from the antitrust laws. The federal policy of maintaining healthy competition in the marketplace, which undergrids the antitrust laws, compels a close look at the challenged acquisition, regardless of whether the DOT has granted an exemption. A number of important factual disputes must be resolved in order for this to occur. Accordingly, summary judgment on ITA's first antitrust claim is not appropriate.

3. Sherman Act Claims

ITA's third claim alleges violation of sections 1 and 2 of the Sherman Act. In particular, ITA contends that the defendants combined and conspired to monopolize, attempted to monopolize, and did in fact monopolize one or more lines of trade or commerce. Defendants respond that this claim, like the other antitrust allegations is barred by the DOT orders. This court's finding that the MLT acquisition may be challenged undermines defendants' argument. However, even if the court had not made this finding, plaintiff would have a right to bring its Sherman Act claims. Any other conclusion would render the 1978 amendment to the Federal Aviation Act meaningless. It would encourage precisely the evil of which Judge Larson warned in his *Fischer* dissent. Once the parties obtained DOT approval of an acquisition, they would be free to engage in all sorts of anticompetitive behavior with impunity. On this point Judge Alsop and Judge Larson are in agreement, because Judge Alsop's opinion in *Fischer* addresses the sufficiency of the plaintiffs' Sherman Act claims on the merits. Although Judge Alsop dismissed the claims, he did not rule that they were barred by collateral estoppel. The reasoning of Judge Larson and the ruling of Judge Alsop compel a similar analysis of ITA's Sherman Act claims in this case.

B. Antitrust Injury

In *Fischer* the Eighth Circuit recently reaffirmed the need for a plaintiff to establish "antitrust injury" in

order to avoid dismissal of its antitrust claims. The court cited language from *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), which required that antitrust plaintiffs

> must prove more than injury casually linked to an illegal presence in the market. Plaintiffs must prove an *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

The *Fischer* majority also relied on *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir. 1983), which held that an antitrust plaintiff must establish that there was "proximate causation between plaintiff's harm and the alleged illegal market restraint." Both *Fischer* and *McDonald* declare that a plaintiff lacks standing to bring an action under the Clayton Act unless it can establish antitrust injury. The proper inquiry involves "an evaluation of the plaintiffs' harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* (citing *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 535 (1983)).

The crux of the problem in *Fischer* was that Fischer was neither a customer nor a competitor of Northwest. Fischer was not forced to pay Monopoly prices nor was it hampered from competing with Northwest by Northwest's exercise of monopoly power. Rather, Fischer claimed to have suffered damage when Northwest terminated Fischer's exclusive regional carrier arrangement. The court stated, "We conclude that Fischer's termination was not caused by anticompetitive conduct or an anticompetitive effect of conduct; rather, it was caused by Northwest's need to avoid employing two regional airlines where only one was required." *Fischer*, 883 F.2d at ___

The court's conclusion in *Fischer* is consistent with *Brunswick*, in which three bowling centers had complained that the petitioner's acquisition of several financially troubled bowling centers had violated the Clayton Act. The respondents argued that absent petitioner's acquisitions, the failing bowling centers would have collapsed, and the respondents would have enjoyed increased profits. The court rejected respondents' claims, stating that the antitrust laws "were enacted for 'the protection of *competition* not *competitors*.'" *Brunswick*, 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). At heart, respondents' action sought protection from increased competition. Therefore, the Court concluded that "if respondents were injured, it was not 'by reason of anything forbidden in the antitrust laws'. . . ." *Brunswick* at 488.

In the Eighth Circuit *McDonald* enumerates the factors to be considered in determining whether a plaintiff is a proper party to bring a private antitrust action:

> (1) The causal connection between the alleged antitrust violation and the harm to the plaintiff; (2) Improper motive; (3) Whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) The directness between the injury and the market restraint; (5) The speculative nature of the damages; (6) The risk of duplicative recovery or complex damage apportionment.

722 F.2d at 1374. In *McDonald* the plaintiffs had owned a corporation that designed and manufactured trans-cutaneous electronic nerve stimulators (TENS). The defendant bought plaintiffs' stock in the company and hired the plaintiffs. As a part of the deal, plaintiffs entered into covenants not to compete with the defendant. Defendant successfully marketed the TENS devices and experiences a substantial growth in sales but suffered aggregate operating losses. The defendant

ultimately demoted the plaintiffs, who subsequently either left the company or were terminated. Since the defendant incurred losses on the TENS units, it was able to avoid additional payments to the plaintiffs under the original stock purchase agreement. The plaintiffs brought an antitrust action alleging that defendant had suppressed the TENS market. They prevailed in the district court, but the court of appeals reversed because the plaintiffs had failed to demonstrate a link between the alleged injury to competition and the alleged harm to the plaintiffs. Because the plaintiffs had voluntarily surrendered their status as actual or potential competitors, they could not complain of their inability to compete.

McDonald, *Brunswick* and *Fischer* are all distinguishable from the case at hand. ITA claims that it is both a customer and a competitor of Northwest. ITA alleges that, as a result of MLT and Republic acquisitions, Northwest is in a position to control both price and seat availability for air travel from Minneapolis/St. Paul to certain cities. Moreover, Northwest allegedly used its power to compete unfairly with ITA in an attempt to drive ITA out of business. As proof, ITA cites Northwest's assault on ITA's winter 1986 program. ITA claims that Northwest cut back the bulk lift available to ITA, and then gave preferential treatment to MLT with respect to price and departure time. ITA was forced to modify or eliminate some of its offerings.

In terms of the *McDonald* factors, ITA has made a sufficient showing with respect to improper motive and a causal connection between the harm to ITA and the alleged antitrust violations. Furthermore, in enacting the antitrust laws, Congress sought to prevent a single corporation from exercising control over both price and quantity available in a relevant market. The impact on ITA is directly related to the alleged market restraint as well. The only area in which ITA's claim is suspect is the difficulty of assessing damages. As the defendants

point out, ITA has enjoyed substantial profits during the time period at isue. By no stretch of the imagination has ITA been "driven from the market." Nevertheless, ITA contends that it lost a significant amount of business due to defendants' anticompetitive conduct. ITA need not cease to exist as Northwest's competitor before bringing an antitrust action. Weighing all of these factors, the court finds that ITA has sufficiently alleged antitrust injury and has supported its claims with enough competent evidence to create issues of fact for a jury to decide. In short, ITA has standing to bring its antitrust claims.

C. Sherman Act Claims

In a final attack on ITA's antitrust claims, defendants contend that ITA's allegations under sections 1 and 2 of the Sherman Act have no basis. First, defendants cite *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), in which the Supreme Court held that for purposes of § 1 of the Sherman Act it is impossible for a parent corporation to conspire with its wholly owned subsidiary. *Id.* at 771 ("the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act.") Defendants argue that Northwest could not have conspired with MLT, as ITA alleges. *Copperweld* does not, however, address the question of whether a corporation may be guilty of violating § 1 by conspiring with a prospective subsidiary during the time prior to acquisition. In the present case ITA claims that Northwest gave MLT preferential treatment long before the October 1985 merger. Indeed, much of the conduct of which ITA complains occurred in the spring of 1985. In *Copperweld* the Court stated that "[i]f a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests. . . ." *Id.* The same is not true here, because plaintiff asserts that Northwest granted MLT preferential treatment prior to their merger.

The Supreme Court has recognized a "basic distinction between concerted and independent action" in Sherman Act cases. *Id.* at 767 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984)). Single firms are subject to Sherman Act scrutiny only when they pose a danger of monopolization. When a conspiracy is alleged, however, "it is not necessary to prove that concerted activity threatens monopolization." *Copperweld*, 467 U.S. at 768. The court finds that genuine issues of material fact exist with respect to the anticompetitive nature of Northwest's contacts with MLT before the merger. Therefore, defendants' motion for summary judgment on ITA's § 1 claims is denied.

Defendants also challenge plaintiff's claims of monopolization and attempt to monopolize under § 2 of PACAs. Sherman Act. The offense of monopoly has two elements: (1) possession of monopoly power in the relevant market and (2) willful acquisition of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966); *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1279 (8th Cir. 1981); *H. J. Inc. v. International Telephone & Telegraph Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989). In order to prove an attempt to monopolize claim, plaintiff must show that defendants

> (1) specifically intended to control prices or destroy competition in some part of commerce; (2) engaged in predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success.

H. J. Inc., 867 F.2d at 1540-41.

In opposition to ITA's monopolization claims, defendants correctly state the legal standards regarding predatory pricing. In the Eighth Circuit prices above fully allocated cost (average total cost) are not anticompetitive, and prices above average variable cost are

presumptively legitimate. *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1346 (8th Cir. 1987). In the case at hand ITA does not accuse the defendants of pricing below average variable cost. However, ITA claims that Northwest offered seats on certain routes to MLT at less than average total cost. In addition, Northwest allegedly controlled the supply of seats available on these routes to the extent that ITA was unable to secure meaningful alternatives. The court finds that ITA has provided sufficient evidence so that, if viewed in the light most favorable to the plaintiff, a reasonable jury could find for ITA on its Sherman Act § 2 claims. Therefore, defendants' motion for summary judgment on these claims must be denied.

II
Common Law Claims

A. Breach of Contract

ITA's sixth claim alleges that Northwest, and Northwest alone, breached two contracts with ITA. The first contract allegedly was negotiated in the spring of 1985 and is memorialized in a letter from Russell of ITA to Beauchine of Northwest dated May 6, 1985. According to ITA, this agreement gave ITA first call on all lift available on Northwest flights for the winter 1986 season. ITA contends that Northwest breached this contract by forcing ITA to give up its exclusive arrangement and share lift with MLT for the winter of 1986. ITA argues that it acceded to these contract modifications under duress in the June 20, 1985 meeting between Russell and Skoog of Northwest.

In the alternative, ITA claims that the renegotiations which occurred on June 20 formed a second contract. This contract is memorialized in four separate Passenger Aircraft Charter Agreements (PACAs). Northwest allegedly breached this second contract by giving MLT preferential treatment. Although ITA's complaint is

unclear in this regard, the memoranda filed on behalf of ITA indicate that Northwest did not violate the letter of the four Instead, ITA complains that Northwest's treatment of MLT violated the covenant of good faith and fair dealing implied in the PACA's because it deprived ITA of the benefit of its bargain. This second breach of contract count actually falls under the third claim in ITA's complaint for "tortious breach of the duty of good faith and fair dealing." It will be addressed in a separate discussion below.

With respect to ITA's first breach of contract claim, Northwest contends that it is barred by the parol evidence rule. According to Northwest, the entire contractual agreement between ITA and Northwest for the winter of 1986 is contained in the four PACAs, and ITA may not alter the terms of the contracts by citing a prior agreement. The purpose of the parol evidence rule is to encourage parties to include all prior and current agreements relating to a certain subject in one written agreement. As the Minnesota Supreme Court stated in *Hruska v. Chandler Associates, Inc.*, 372 N.W.2d 709, 713 (Minn. 1985), "the parol evidence rule seeks to minimize the risk of future litigation by encouraging parties to put their entire agreement in writing, providing that when parties reduce their agreement to writing, parol evidence is ordinarily inadmissible to vary, contradict, or alter the written agreement." (citation omitted).

The PACAs appear to be comprehensive. Moreover, they each contain the following clause:

> This Agreement . . . [s]upersedes all prior agreements, representations or understandings between the parties, oral or written, with respect to the same subject matter, and fully sets forth the understanding of the parties with respect to the subject hereof. . . .

Normally this type of integration clause, combined with the policies underlying the parol evidence rule, would preclude any contract claim based on the existence of

prior agreements. The parol evidence rule does contain exceptions, however, and ITA argues that its claim falls squarely within one of them. ITA asserts that the timing of the contract modifications and the market power possessed by Northwest deprived ITA of the opportunity to find serious alternatives for its winter 1986 program. In this "take it or leave it" situation ITA acquiesced and "agreed" to the contract modifications. It is well-settled that duress may invalidate certain terms of a contract or may void the contract altogether when an agreement is coerced by unlawful threats. *Bond v. Charlson*, 374 N.W.2d 423, 428 (Minn. 1985); *St. Louis Park Investment Co. v. R.L. Johnson Investment Co., Inc.*, 411 N.W.2d 288 (Minn. Ct. App. 1987). This case is in part an antitrust action, in which ITA claims that Northwest exercised monopoly power. Although evidence of actual duress is slim, the court is not able to conclude that no genuine issues of material fact remain on this score. Accordingly, it would be inappropriate to grant summary judgment on ITA's claim for breach of contract.

B. Tortious Breach of the Duty of Good Faith and Fair Dealing

In *Wild v. Rarig*, 302 Minn. 419, 234 N.W.2d 775, 790 (1975), *cert. denied* 424 U.S. 902 (1976), the Minnesota Supreme Court ruled that no independent tort action exists for bad faith breach of contract. *See also Space Center, Inc. v. 451 Corp.*, 298 N.W.2d 443, 452 (Minn. 1980) ("A malicious or bad faith motive in breaching a contract action does not convert a contract action into a tort action.") *Kramer v. Bruns*, 396 N.W.2d 627, 631 (Minn. Ct. App. 1986) ("bad faith termination of a contract is not an independent tort."). Recognizing this, ITA seeks contractual damages for breach of the covenant of good faith and fair dealing implied in the four PACAs. Plaintiff relies primarily on three Minnesota cases. The language of the cases appears to support plaintiff's position, but a close reading of the

cases reveals that Minnesota does not recognize a cause of action for breach of a covenant of good faith and fair dealing independent from an underlying breach of contract claim.

In the first case, *Haase v. Stokely-Van Camp, Inc.*, 257 Minn. 7, 99 N.W.2d 898 (1959), a corn grower brought an action against a canning company for breach of contract. The defendant had agreed to purchase the plaintiff's crop, but delivery was to be made "in such manner, condition and time as the Company may direct." 99 N.W.2d at 900. Ultimately, the defendant refused to purchase the plaintiff's sweet corn because it had become too mature. Although the canning company did not violate the literal terms of the agreement, the court affirmed a verdict in favor of the plaintiff because the defendant had induced the breach by its own actions. The court stated,

> In a contract of this kind, good faith on the part of both contracting parties must be implied. Where one of the contracting parties makes it impossible for the other to perform, he should not be permitted to take advantage of his own action in so doing.

Id. at 902 (footnote omitted). The Court did not rule that the corn grower prevailed on an independent claim of breach of a duty of good faith and fair dealing. Rather, it held that the corn grower could use the implied contractual promise to act in good faith in order to defeat canning company's defense that plaintiff failed to perform.

In the second case, *American Warehousing v. Michael Ede Management*, 414 N.W.2d 554 (Minn. Ct. App. 1987), the Minnesota Court of Appeals affirmed a trial court decision to grant summary judgment dismissing plaintiff's claim that the defendant had breached a distributorship agreement and the covenant of good faith and fair dealing implied therein. Relying on *Haase*, the court stated, "In every non-sales contract there is an implied covenant of good faith and fair dealing which

requires that one party not make it impossible for the other party to perform the contract." *Id.* at 557 (citations omitted). Again, the court did not recognize an independent cause of action or claim for damages for breach of a covenant of good faith and fair dealing.

Finally, plaintiff cites the case of *J. J. Brooksbank Co. v. Budget Rent-A-Car*, 337 N.W.2d 372 (Minn. 1983). The case involved a dispute between a rental car company and its franchisee. Due to technological advances, the rental car company had restructured its reservation system. As a result, the company was no longer willing to honor its previous arrangement by which the franchisee received reservations free of charge. The issue for decision was whether the trial court had erred in interpreting the contract. The Supreme Court used the concept of an implied covenant of good faith to interpret the ambiguity in the contract which resulted from the technological change. *Id.* at 376. No such ambiguity exists in the PACAs.

Having considered the relevant case law, the court concludes that ITA has no independent cause of action for breach of the duty of good faith and fair dealing. Since ITA does not claim that the terms of the PACAs have been breached, the fourth claim in ITA's supplemental complaint must be dismissed.

C. Fraud

In Minnesota a plaintiff must prove eleven elements in order to establish a fraud claim:

(1) There must be a representation;
(2) That representation must be false;
(3) It must have to do with a past or present fact;
(4) That fact must be material;
(5) It must be susceptible of knowledge.
(6) The representer must know it to be false, or in the alternative, must assert it as of his own knowledge without knowing whether it is true or false;
(7) The representer must intend to have the other

person induced to act, or justified in acting upon it;

(8) That person must be so induced to act or so justified in acting;

(9) That person's action must be in reliance upon the representations

(10) That person must suffer damage; and

(11) That damage must be attributable to the misrepresentation, that is, the statement must be the proximate cause of the injury.

Davis v. Re-Trac Manufacturing Corp., 276 Minn. 116, 117, 149 N.W.2d 37, 38-39 (1967); *Florenzano v. Olson*, 387 N.W.2d 168, 174 n. 4 (Minn. 1986).

Defendants contend that plaintiff's fraud claims are flawed because the alleged representations do not have anything to do with past or present fact. Instead, the representations were mere promises or predictions of what would happen in the future. If so, they are insufficient to support a fraud claim because "a representation or expectation as to future acts is not a sufficient basis to support an action for fraud merely because the represented act or event did not take place." *Vandeputee v. Soderholm*, 298 Minn. 505, 216 N.W.2d 144, 147 (1974). However, the court in *Vandeputte* went on to say that a mispresentation of present intention may form the basis for a fraud claim, provided that "the promisor had no intention to perform at the time the promise was made." *Id.*

The court need analyze only one of the alleged misrepresentations in the case at hand to demonstrate that ITA's fraud claims are not ripe for summary judgment. ITA alleges that on June 20, 1985, Skoog stated that ITA and MLT would be treated equally with respect to departure times and price on the MSP-Las Vegas charters. The statement is a representation of present intention, and it is entirely possible that Skoog did not intend to fulfill the promise even as he spoke it. Indeed, ITA has presented evidence in support of its claim that by June 20 Northwest had already formulated a plan

to drive ITA out of business. Viewed in the light most favorable to the plaintiff, this evidence could also convince a jury that Skoog never intended to perform in accordance with his promise. The fraud claim, therefore, will not be dismissed.

D. Interference with Contractual Relations and Interference with Prospective Economic Advantage

ITA's final claim alleges that NWA and MLT interfered with contractual relations between ITA and Northwest and interfered with ITA's prospective economic advantage by sabotaging its winter 1986 program. The elements of a claim for interference with contractual relations are the same as the elements required for inducing a breach of contract. *Aslakson v. Home Savings Association*, 416 N.W.2d 786 (Minn. Ct. App. 1987). The five elements for these claims are set forth in *Royal Realty Co. v. Levin*, 244 Minn. 288, 69 N.W.2d 667 (1955). The plaintiff must establish: "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his intentional procurement of its breach; (4) without justification; and (5) damages resulting therefrom." *Id.* at 671 (footnote omitted).

Defendants challenge the sufficiency of plaintiff's claim in two respects. First, defendants contend that no contract existed for the winter 1986 season until the PACAs were signed. As discussed above with respect to the breach of contract claim, the court is not satisfied that no genuine issues of fact remain regarding the existence of a prior contract. Thus, plaintiff has met its burden of establishing the existence of a contract for purposes of this motion.

Second, defendants contend that neither NWA nor MLT could have interfered with a contract between ITA and Northwest. With regard to NWA, defendants are correct. NWA, as the parent company of Northwest, was

able to control Northwest to the extent that NWA cannot be considered a third party capable of interfering with ITA/Northwest contracts. ITA complains of the actions of some NWA officers, but these persons (such as Steven Rothmeier) also held positions with Northwest. "Officers of a corporation may not be held personally liable for interference with a contract merely for causing the corporation not to perform the contract." *Bouten v. Richard Miller Homes, Inc.*, 321 N.W.2d 895, 900 (Minn. 1982) (citations omitted). MLT, on the other hand, was separate from Northwest at the time Northwest allegedly breached its contract giving ITA first call for lift on its flights. Genuine issues of material fact exist which preclude summary judgment on the claim against MLT.

Even if an exclusive contract between ITA and Northwest did not exist, MLT still could be liable for interference with prospective contractual relations. The Minnesota Supreme Court recognized this tort in *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628 (1982). In doing so, the Court was careful to protect lawful competition. The Court cited with approval § 766B of the Restatement (Second) of Torts, which provides:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relations, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Id. at 633.

The key is that the interference must be "intentional and improper." Defendants contend that Northwest offered lift to MLT merely as a result of, and in furtherance of, vigorous competition. This, defendants assert, is not improper. The Restatement provides that

interference with a prospective contractual relation is not improper if:

> (a) the relation concerns a matter involved in the competition between the actor and the other and
> (b) the actor does not employ wrongful means and
> (c) his action does not create or continue an unlawful restraint of trade and
> (d) his purpose is at least in part to advance his interest in competing with the other.

Restatement (Second) of Torts § 768.

The problem in the case at hand is that ITA claims that MLT's action created an unlawful restraint of trade. Specifically, ITA accuses MLT of concerted activity in violation of § 1 of the Sherman Act. This claim is still alive in this case. Therefore, ITA's claim for interference with prospective contractual relations must remain as well.

Accordingly, **IT IS ORDERED** that:

1. Plaintiff's motion for partial summary judgment shall be, and hereby is, **DENIED** in its entirety.
2. Defendants' motions for summary judgment on plaintiff's second and fourth claims shall be and hereby are, **GRANTED**.
3. Defendants' motions for summary judgment on plaintiff's first, third, fifth and sixth claims shall be, and hereby are, **DENIED**.
4. Defendants' motion for summary judgment on plaintiff's seventh claim shall be, and hereby is, **GRANTED** as to NWA and **DENIED** as to MLT.

Dated: October 5, 1989.

Paul A. Magnuson
United States District Court Judge